Simulated Sodomy and Other Forms of Heterosexual 'Horseplay': Same-Sex Sexual Harassment and the Myth of the Gender Monolith Before and After Oncale

Deborah Zalesne  
*CUNY School of Law*

Hilary Axam  
*University of Witwatersrand*

How does access to this work benefit you? Let us know!

Follow this and additional works at: [http://academicworks.cuny.edu/cl_pubs](http://academicworks.cuny.edu/cl_pubs)

Part of the [Law Commons](http://academicworks.cuny.edu/cl_pubs)

**Recommended Citation**

Zalesne, Deborah and Axam, Hilary, "Simulated Sodomy and Other Forms of Heterosexual 'Horseplay': Same-Sex Sexual Harassment and the Myth of the Gender Monolith Before and After Oncale" (1999). CUNY Academic Works. [http://academicworks.cuny.edu/cl_pubs/112](http://academicworks.cuny.edu/cl_pubs/112)

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact AcademicWorks@cuny.edu.
SIMULATED SODOMY AND OTHER FORMS OF HETEROSEXUAL "HORSEPLAY:" SAME SEX SEXUAL HARASSMENT, WORKPLACE GENDER HIERARCHIES, AND THE MYTH OF THE GENDER MONOLITH BEFORE AND AFTER ONCALE

Hilary S. Axam†
Deborah Zalesne‡‡

TABLE OF CONTENTS

INTRODUCTION ................................................................. 157
I. OPPOSITE-SEX SEXUAL HARASSMENT CASES:
RECOGNIZING THE RELEVANCE OF MANY ASPECTS OF SEX .................. 161
   A. The Evolution of Sexual Harassment Jurisprudence:
      Judicial Cognizance of the Nexus Between Gender Role
      Stereotypes, Sexualized Conduct, and
      Employment Discrimination Based on Sex .................................. 162
   B. Invocation of Gender Stereotypes ............................................ 164
      1. The Devaluation of Femininity:
         Derision of Stereotypically Female Traits ................................ 165
      2. Disciplining Divergence:
         Penalizing Failure to Conform to Stereotypical Gender Roles .......... 168
   C. Sexualized Conduct as a Means of Asserting Gender Dominance .... 170
      1. Humiliation and Ridicule Centered on
         Sex-Based Physical Attributes and Stereotypical Sexuality ........... 171
      2. Groping, Grabbing, and Other Actual and Threatened Invasions:
         Exploitation of Vulnerability to Sexual Domination and Abuse ....... 173
II. SAME-SEX SEXUAL HARASSMENT CASES:
DIVERGENT JUDICIAL RESPONSES TO SIMILAR SEX-BASED CONDUCT .... 176
   A. Divergent Judicial Responses .................................................. 177
      1. The Categorical Rejection of All Same-Sex Harassment Claims .. 177
      2. Ignoring the Invocation of Gender Stereotypes and
         Perpetuating the Myth of the Gender Monolith:
         The Requirement of an Anti-Male Environment ............................ 180

‡‡. Assistant Professor, City University of New York School of Law. B.A. 1988, Williams College; J.D. 1992, University of Denver College of Law; LL.M. 1997, Temple School of Law. The authors would like to thank Marina Angel, Arthur Best, Frank Deale, Richard Greenstein, Nancy Krauer, and Ruthann Robson for their insightul suggestions and comments. We would especially like to thank Alexis Baden-Mayer for her excellent research and editorial assistance.

Copyright © 1999 by the Yale Journal of Law and Feminism
3. Missing the Significance of Sexualized Conduct:
   Misplaced Emphasis on Sexual Desire and the
   Requirement of Homosexual Attraction ........................................ 184
4. Acknowledging the Role of Gender Stereotypes and
   Sexualized Conduct: Recognition of the Actionable Sex-Based
   Nature of Same-Sex Sexual Harassment ...................................... 187
B. The Common Sex-Based and Sex-Discriminatory
   Nature of Opposite-Sex and Same-Sex Harassment ....................... 192
   1. Devaluing Femininity and Disciplining Divergence:
      The Invocation and Enforcement of Gender Stereotypes ............. 192
   2. Scenarios of Sexual Objectification, Domination, and Abuse:
      Sexualized Conduct and the Assertion of Gender Dominance ......... 198
III. THE SIGNIFICANCE OF ONCALE: A PYRRIC VICTORY
   FOR SAME-SEX SEXUAL HARASSMENT PLAINTIFFS? ....................... 205
      A. Addressing the “Bewildering” Divergence Among Lower Courts:
         Recognizing the Cause of Action, Overruling the Categorical Preclusion,
         and Rejecting the Requirement of Homosexual Attraction ........... 205
      B. The Dilemma of Oncale’s Dicta: Perpetuating Problematic
         Tendencies in the Lower Courts’ Jurisprudence ....................... 208
         1. “General Hostility” and “Direct Comparative Evidence:”
            Adherence to the Myth of the Gender Monolith ..................... 209
         2. “Explicit or Implicit Proposals of Sexual Activity:”
            Obscuring the Significance of Gender-Subordinating
            Sexualized Conduct ............................................. 212
      C. Oncale’s Resounding Silence: The Court’s Failure to
         Countenance the Sex-Discriminatory Implications of
         Same-Sex Gender Stereotyping and Same-Sex Sexual Subordination .... 214
      D. The Ramifications of Oncale in the Lower Courts:
         The Continued Challenge of Distinguishing Actionable
         Sex-Based Harassment from Heterosexual “Horseplay” ............... 221
IV. PLACING ONCALE IN ITS PROPER CONTEXT:
   TOWARD A SEX-BASED CAUSATION ANALYSIS THAT COMPORTS
   WITH CONTEMPORARY UNDERSTANDINGS OF “SEX” ....................... 225
   A. Legal Formulations of “Sex:”
      Recognizing the Broad Array of Sex-Based Motivations ............... 226
         1. Doctrines of Sex-Based Causation ................................ 227
         2. Principles of Consistent Application ................................ 232
         3. Purposes of Title VII ............................................. 234
   B. Contemporary Understandings of “Sex:”
      Recognizing the Limits of Biological Determinism .................... 236
V. CONCLUSION ................................................................. 242
INTRODUCTION

From August to November 1991, Joseph Oncale, a married, heterosexual father of two, worked on an oil platform in the Gulf of Mexico. He quit his job, however, after two of his co-workers restrained him in the shower and forced a bar of soap into his anus while threatening to rape him.\(^1\) An automotive mechanic named Mark McWilliams reported to work each day to face not only constant teasing about his sex life and inability to "get" a woman, but also physical harassment. His co-workers exposed their genitals to him, placed a condom in his food, flicked their tongues at him while saying, "I love you, I love you," tied his hands behind his back, blindfolded him, forced him to his knees, and simulated sexual acts by inserting a finger in his mouth and a broomstick between his buttocks.\(^2\) Over the course of two years, Phil Quick, a welder and machine operator at a plant in Iowa, was subjected to a practice of "bagging," common in his workplace, in which men would grab and squeeze other men's testicles. Quick, a heterosexual, endured repeated homophobic epithets and over one hundred bagging incidents, including one in which a co-worker restrained Quick's arms while another grabbed and squeezed Quick's testicles hard enough to produce bruising and swelling.\(^3\) During the summer of 1992, the city of Belleville, Illinois, hired J. Doe and H. Doe, two heterosexual, sixteen-year-old twin brothers, for summer maintenance jobs. When they arrived, Jeff Dawe, a heterosexual "former Marine of imposing stature," began picking on H. Doe, who wore an earring. He called him "queer," "fag," and "bitch," questioned whether he was "a boy or a girl," threatened to take H. "out to the woods" and "get him in the ass;" and on one occasion grabbed H.'s testicles.\(^4\)

A growing body of scholarship recognizes that sexual exploitation, domination, intimidation, and abuse of men by other men\(^5\) constitutes a long-

---

2. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996).
overlooked form of gender discrimination that asserts the dominance of the masculine over the feminine and thus reflects and perpetuates deeply-rooted patterns of gender inequality. Such conduct focuses intensively on portraying the target as a passive, feminized recipient of the harasser’s aggressive, stereotypically masculine sexual advances. As a result, the conduct echoes and enforces entrenched notions of male dominance in which power is identified and allocated based on the possession of stereotypically masculine physical and behavioral characteristics such as larger physical size, superior physical strength, aggressiveness, and sexual assertiveness. By vividly invoking stereotypical paradigms of male sexual power and female sexual submission, such conduct operates to exert and preserve the power of stereotypically masculine males in a gender-defined hierarchy by relegating males identified as exhibiting more stereotypically female, traditionally devalued traits to inferior status.

Increasingly, men who have experienced this type of sexual humiliation, intimidation, and abuse at the workplace, many of whom have been forced to leave their jobs due to emotional distress and fear of rape, have brought suit under Title VII of the Civil Rights Act of 1964, which proscribes acts that subject an employee to adverse terms and conditions of employment “because of” the employee’s “sex.” Although these complaints have been founded on well-established principles that have emerged from over twenty years of litigation involving sexual harassment directed at women, the courts have been far from uniform in applying these principles to allegations of male-on-male sexual harassment.

environment claim brought by female employee against female employer because alleged harassing conduct was “too mild and infrequent to constitute sexual harassment as a matter of law”); Ryczek, 877 F. Supp. at 765 (granting employer’s motion for summary judgment because defendant took “prompt and adequate remedial actions” to remedy the “unpleasant and unprofessional manner” in which plaintiff was treated by co-worker); Myers, 874 F. Supp. at 1546 (holding that female employee’s hostile work environment claim against female employer was not actionable because same-sex sexual harassment was never actionable); Marrero-Rivera, 800 F. Supp. at 1024 (dismissing hostile work environment claim brought by woman against another woman for failure to procure a right-to-sue letter).


7. See infra Part II.B. (analyzing conduct that asserts the dominance of masculinity over femininity); see also infra notes 449-450 and accompanying text (discussing attributes stereotypically associated with males and the power and privilege derived therefrom).

8. See Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 236 (1994) (“[M]en cannot simultaneously be used ‘as women’ and stay powerful because they are men.”) (quoting Andrea Dworkin, Right-Wing Women 129 (1983)); Kramer, supra note 6, at 317.

9. See, e.g., Oncale, 118 S. Ct. at 1001; McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996).

10. 42 U.S.C. § 2000e-2 (a)(1) (1994). Although plaintiffs have challenged these types of conduct under both state and federal laws proscribing sex-based employment discrimination, this Article focuses primarily on cases construing federal anti-discrimination statutes.

11. For an overview of the cases addressing same-sex sexual harassment see Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169 (1998); Robert Brookins, A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment, 46 Drake L. Rev. 441 (1998); Amelia A. Craig,
In analyzing workplace harassment directed at women, courts have consistently recognized the sex-based nature of conduct that invokes gender stereotypes, either by devaluing stereotypically female traits or by punishing those who diverge from stereotyped gender roles. Likewise, in the context of harassment directed at women, courts have recognized the sex-based nature of sexualized conduct that humiliates and intimates the target by focusing on her sex-based physical attributes or vulnerability to sexual domination. When the target is the same sex as the harasser, however, many courts have been reluctant to recognize the sex-based nature of conduct that demeans the target for possessing feminine traits or diverging from stereotypical gender roles. In the context of harassment directed at men by men, most courts have been equally hesitant to recognize the sex-based nature of degrading, abusive sexualized conduct that exploits the target’s vulnerability to sexual domination. Although a few courts have recognized the actionable sex-discriminatory nature of such conduct, some courts have imposed categorical rules precluding same-sex harassment claims. Others have required a showing of general hostility to all males. And yet a third line of cases has required a showing of homosexual attraction, resulting in deep divisions in the lower courts’ jurisprudence.

Recently the Supreme Court addressed the issue of same-sex sexual harassment in Oncale v. Sundowner Offshore Services, Inc. In a terse, unanimous opinion, the Court held that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant . . . are of the same sex.” The Court resolved some of the conflicts among the lower courts, effectively overruling both cases that had categorically precluded same-sex sexual harassment claims and cases that had precluded such claims absent proof of homosexual attraction between the harasser and the target. However, in recognizing a cause of action for same-sex sexual

---

12. See infra Part I.B.-(examining cases recognizing the actionable sex-based nature of conduct directed at women that devalues stereotypically feminine traits, invokes gender stereotypes, and evokes sexually explicit imagery to humiliate, intimidate, and demeans the target).
13. See infra Part II.A.-(analyzing cases recognizing actionable sex-based nature of male-on-male harassment; infra Part II.A.1. (discussing cases categorically precluding same-sex sexual harassment claims).
14. See infra Part II.A.2. (analyzing cases requiring a showing of an anti-male environment as a prerequisite to same-sex harassment claims).
15. See infra Part II.A.3. (examining cases requiring a showing of homosexual attraction as a predicate to same-sex harassment claims).
17. Id. at 1001-02.
18. See id. at 1002.
harassment, the Court offered little guidance regarding the distinction between mere “locker room antics”\textsuperscript{19} or heterosexual “horseplay”\textsuperscript{20} and the types of sex-based degradation and intimidation that constitute actionable discrimination “because of” the target’s “sex” within the meaning of Title VII.\textsuperscript{21}

This Article examines the jurisprudence applying Title VII’s “because of . . . sex” requirement in the sexual harassment context, contrasting the formulations of this standard that have emerged in the opposite-sex harassment cases against those that have developed in the same-sex harassment cases. Based upon this examination, this Article argues that the same-sex harassment cases, in their failure to acknowledge the sex-discriminatory purpose and effect of gender stereotypes and sexual humiliation and intimidation directed at men by other men, have adopted unduly restrictive conceptions of “sex” and sex-based causation that are at odds with established Title VII jurisprudence. This Article then analyzes the impact of the Supreme Court’s \textit{Oncale} decision on this fragmented area of the law and posits that, despite its dicta that appear to perpetuate some of the myths and misperceptions pervading the lower courts’ jurisprudence, \textit{Oncale} does not disturb the significant body of precedent elucidating Title VII’s “because of . . . sex” requirement. Accordingly, \textit{Oncale} must be read in the context of the broader Title VII jurisprudence, which, in contrast to much of the same-sex harassment jurisprudence, does not focus myopically on biological sex. Rather, this jurisprudence focuses on the individual plaintiff’s sex- and gender-related attributes and recognizes the relevance of gender stereotyping and sexualized conduct in establishing and enforcing workplace gender hierarchies. Thus, this Article urges the courts to look beyond the constrained conceptions of sex implicit in \textit{Oncale}’s dicta and to conduct a rigorous and principled analysis of the sex-based causation issue that comports with established legal formulations and contemporary understandings of the term “sex.”

Part I of the Article examines cases involving sexual harassment perpetrated by men against women. In these cases the courts have readily inferred the requisite sex-based nature of the harassment from the nature of the conduct itself. This conduct frequently derides the target based upon gender stereotypes and humiliates and intimidates the target through sexualized conduct focusing on the target’s sex-based physical attributes and vulnerability to sexual domination.


Part II discusses the cases addressing harassment directed at men by men. In these cases, despite the similar invocations of gender stereotypes and sexualized conduct to demean and intimidate the target, the courts have been far more reluctant to recognize the gender-based and sex-discriminatory nature of this conduct. The jurisprudence in this area is consequently fraught with tensions and inconsistencies arising from the divergent conceptions of sex and sex-based causation implicit in the array of lower court opinions analyzed in this part.

Part III analyzes the impact of Oncale on judicial approaches to same-sex harassment claims. Although the decision effectively overruled both the cases that had categorically precluded same-sex harassment claims and the cases that had precluded such claims absent a showing of homosexual attraction, it implicitly lent credence to some of the most problematic aspects of the lower courts’ jurisprudence. This part argues that Oncale’s dicta, like many earlier same-sex harassment cases, implicitly view the concept of sex under Title VII in a simplistic manner defined by biological sex that obscures the numerous gender-based distinctions and the potent gender-based power dynamics that occur within each biological sex. By conceiving of sex in this biologically dichotomous, gender-monolithic manner, Oncale’s dicta fail to acknowledge the significance of the gender stereotyping and sexually subordinating conduct that marginalizes and demeans certain individuals on the basis of their sex- and gender-related traits. These dicta thus perpetuate the tendencies in the prior same-sex harassment jurisprudence to disregard these forms of conduct that the courts have viewed as centrally relevant to the “because of sex” inquiry in the context of harassment directed at women.

Finally, Part IV examines Oncale in the context of established Title VII principles and observes that Oncale does not purport to overrule the understandings of sex and sex-based causation in the broader Title VII jurisprudence. Because the monolithic conception of “sex” implicit in Oncale’s dicta is at odds with established legal formulations and contemporary understandings of the notion of sex, Part IV urges the lower courts to eschew Oncale’s narrow conception of “sex” and sex-based causation and to undertake an independent analysis of the aspects of an individual’s sex and gender identity that affect his or her status in terms of workplace gender hierarchies. By doing so, Part IV concludes, courts addressing claims of male-on-male harassment can begin to develop an analytic framework for same-sex harassment claims that better comports with the broader principles and policies of Title VII.

I. OPPOSITE-SEX SEXUAL HARASSMENT CASES:
RECOGNIZING THE RELEVANCE OF THE MANY ASPECTS OF SEX

This part examines cases addressing claims of sexual harassment perpetrated by men against women. In these cases, the harasser frequently invokes gender stereotypes to demean women who possess traditionally devalued, feminine traits and to penalize women who fail to conform to prescribed gender roles. Moreover, the harassment often employs sexually
explicit conduct that is calculated to humiliate, intimidate, and degrade women in ways that are inextricably linked to aspects of their sex by exploiting their vulnerability to sexual domination and abuse. In analyzing these forms of harassment directed at women, the courts have recognized, implicitly or explicitly, that the plaintiff’s sex consists of a constellation of factors including not only her biological attributes but also her conformity to gender-based stereotypes and her projected or perceived sexuality. Thus, in the context of opposite-sex harassment, the courts have readily recognized the actionable, sex-based nature of these forms of conduct that are based on one or more aspects of the target’s sex or gender identity.

A. The Evolution of Sexual Harassment Jurisprudence: Judicial Cognizance of the Nexus Between Gender Role Stereotypes, Sexualized Conduct, and Employment Discrimination Based on Sex

Title VII of the Civil Rights Act of 1964 provides that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual’s . . . sex.”22 In setting forth this prohibition against discrimination based on an individual’s sex, Title VII does not define the term “sex.” Moreover, because the statute, originally aimed at redressing racial discrimination, was expanded to include a proscription against sex discrimination only during the final stage of legislative proceedings in an apparent attempt to defeat its enactment, its legislative history does little to elucidate the concept of sex.23 Because of this sparse legislative history, the jurisprudence defining the parameters of a cause of action under Title VII has evolved with little legislative guidance on the question of when the challenged conduct occurs “because of” a person’s “sex.”

The courts’ recognition of sexual harassment as a form of sex discrimination has evolved gradually over the past two decades. Initially, many courts rejected women’s contentions that sexual harassment constituted a form of actionable sex discrimination.24 In the view of these courts, sexual

23. See 110 Cong. Rec. 2577-84 (1964); Charles Whalen & Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 84 (1985); Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 816-17 (1991) (concluding that legislators who added the term “sex” to Title VII were opposed to the Act and “hoped that the inclusion of sex would highlight the absurdity of the effort as a whole, and contribute to its defeat”); Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 Yale L. & Pol’y Rev. 333, 346 (1990) (noting that proscription against sex discrimination was added at end of legislative process with no meaningful discussion). The inclusion of the word “sex” came as a result of a floor amendment by Representative Howard Smith, an opponent of Title VII, who proposed the amendment in the spirit of “‘satire and ironic cajolery’” to inspire opposition to the bill. See Deering, supra note 11, at 235-36 & n.28 (quoting Francis J. Vaas, Title VII: Legislative History, 7 B.C. Indus. & Com. L. Rev. 431, 441-42 (1996)). The bill passed as amended, however, with little debate on the issue of sex discrimination. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).
harassment was an inevitable component of interactions between men and women that constituted a private, interpersonal matter beyond the purview of employment discrimination laws.\textsuperscript{25} In the late 1970s, however, courts began recognizing that the conduct at issue was intimately related to the target's status as a woman and thus began to hold that conditioning employment-related benefits on sexual favors constituted a form of sex discrimination that has come to be known as quid pro quo sexual harassment.\textsuperscript{26}

Several years elapsed before the courts began to recognize that sexual harassment could constitute a form of sex-based discrimination even where the harasser did not demand sexual favors in exchange for tangible employment-related benefits. In \textit{Bundy v. Jackson},\textsuperscript{27} the Court of Appeals for the D.C. Circuit held that sexual harassment that creates a hostile environment, thus altering the conditions under which an employee must work, constitutes actionable sex discrimination.\textsuperscript{28} In 1986, the Supreme Court adopted this reasoning in its landmark decision in \textit{Meritor Savings Bank v. Vinson} and held that Title VII forbids not only quid pro quo harassment but also "hostile environment" harassment that, while not affecting tangible economic benefits, subjects the plaintiff to a hostile or offensive working environment.\textsuperscript{29} In recognizing a cause of action for hostile environment sexual harassment, the Court explained that:

\begin{quote}
[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.\textsuperscript{30}
\end{quote}

Relying in part on guidelines promulgated by the Equal Employment Opportunity Commission, the Court stated that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."\textsuperscript{31} Expounding on its definition of hostile environment harassment several years later, the Court explained, "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an

\begin{footnotesize}
\textsuperscript{25} See Franke, supra note 11, at 699-701.
\textsuperscript{26} See, e.g., Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 501 F.2d 983 (D.C. Cir. 1977).
\textsuperscript{27} 641 F.2d 934 (D.C. Cir. 1981).
\textsuperscript{28} See id. at 946.
\textsuperscript{30} Id. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
\textsuperscript{31} Id. at 65. The relevant guidelines state in pertinent part: "Harassment on the basis of sex is a violation of ... Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct has the purpose or effect of unreasonably interfering with individual's work performance or creating an intimidating, hostile, or offensive work environment." 29 C.F.R. § 1604.11(a) (1985).
\end{footnotesize}
abusive working environment, Title VII is violated." 32 The Supreme Court has, since its decision in Meritor, clarified the parameters of a hostile environment sexual harassment claim by holding that actionable harassment must be hostile and abusive in both the subjective sense that the victim "subjectively perceive[s] the environment to be abusive" and the objective sense that a reasonable person would find the conduct hostile or abusive. 33

The Supreme Court has, however, had little opportunity to expand upon the meaning of the requirement that harassment be based on the plaintiff's "sex" within the meaning of Title VII, and the lower courts have been similarly reticent as to the precise meaning of this provision. 34 Nonetheless, in the opposite-sex context, courts have readily inferred the requisite sex-based causal nexus from the nature of the harassment itself when the harassment invokes gender-based stereotypes or entails sexualized interactions that reinforce and perpetuate gender hierarchies.

B. Invocation of Gender Stereotypes

Many forms of sexual harassment that the courts have recognized as actionable sex discrimination involve conduct based on gender stereotypes. Ironically, women are often caught in what the Supreme Court has described as the "catch-22" of sex discrimination based on gender stereotypes: they are harassed both for possessing stereotypically feminine traits that are devalued in the male-dominated workplace and for failing to conform to gender-defined norms dictating that women should not exhibit the qualities of strength and aggressiveness that are rewarded in the employment market. 35 In either case, the courts, implicitly recognizing that a person's gender is integrally related that

---

32. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations and internal quotations omitted). In contrast to quid pro quo harassment, where the harasser is deemed to be acting on behalf of the employer by denying access to tangible employment benefits, in the context of hostile environment harassment, the harasser generally is not acting on the employer's behalf. Accordingly, the plaintiff must establish the employer's liability by demonstrating that the employer's policies or practices allowed the harassment to continue. See Henson, 682 F.2d at 909. The Supreme Court recently clarified standards of employer liability for hostile environment harassment perpetrated by a supervisor against a subordinate employee. As the Supreme Court explained, the employer can be held vicariously liable for such harassment, but may absolve itself of liability by establishing an affirmative defense consisting of two necessary elements: (1) that the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) that the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer" or to take other measures to avoid harm. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998).

33. Harris, 510 U.S. at 21-22; see also Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997) ("[P]laintiff must show both that the offending conduct created an objectively hostile environment and that she subjectively perceived her working condition as abusive."); Smith v. Northwest Fin. Acceptance, Inc., 129 F.3d 1408, 1413 (10th Cir. 1997) (holding that conduct must be both subjectively and objectively abusive).

34. See Franke, supra note 11, at 692-94 (noting the Supreme Court's silence as to the basis for its inference that sexual harassment constituted a form of discrimination based on sex); id. at 718 (observing that "many courts intone the 'because of sex' element and then never discuss it again").

35. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). In Hopkins, the plaintiff was denied partnership because her male colleagues viewed her as too aggressive, as evidenced by their admonitions that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235 (citing Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).
person's sex as it is perceived by others, have characterized such gender-based conduct as sex-based conduct within the purview of Title VII.

1. The Devaluation of Femininity:
   Derision of Stereotypically Female Traits

A recurring trend in many cases involving sexual harassment directed at women involves the harasser’s attempt to portray the target as inadequate or inferior based on stereotypical concepts of women. In some instances, harassers simply express a general hostility to the presence of women in the workplace or in certain jobs that have traditionally been reserved for men.36 In other cases, particular women are singled out for harassment based on individual traits that render them especially vulnerable to harassment founded on gender stereotypes. Frequently, this harassment centers on stereotypical images of women as physically weak and delicate and as nurturers or sex objects rather than as competent workers.37 By invoking these traits in an insulting and demeaning manner, the harasser expresses animus toward the presence of devalued, stereotypically feminine characteristics in the workplace.

In Saum v. Widnall,38 for instance, an Air Force cadet whom fellow cadets described as "too feminine" and "too pretty" to be an officer became the target of a pattern of sexual harassment. This harassment included epithets such as

36. See, e.g., Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 998-99 (10th Cir. 1996) (plaintiff, the only woman on the sales force at a car dealership, was told that "a woman has no place in a car dealership," and that the only way she could sell cars was by "sleeping with the management" or "pulling up her skirt"); Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1237 (2d Cir. 1995) (general manager made hostile remarks about female workers in general, and referred to female employees as "a bunch of dumb cunts"); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1318 (8th Cir. 1994) (defendant repeatedly made comments such as "there isn't a woman alive that can make it with Yellow Pages"); Sassaman v. Heart City Toyota, 879 F. Supp. 901, 909 (N.D. Ind. 1994) (plaintiff was told that women are "not cut out" to be salespeople). In instances where a woman's clear qualifications for the job make it difficult for harassers to portray her as unfit for the work, harassers often resort to imposing additional barriers to the woman's successful work performance in order to convey their belief that those with feminine attributes are unsuited for the job. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1473 (3d Cir. 1990) (harassers stole policewoman's case files); Lipsett v. University of Puerto Rico, 864 F.2d 881, 910 (1st Cir. 1988) (harassers falsified records to create appearance that female surgery resident had made an error); Thorne v. City of El Segundo, 726 F.2d 459, 462-63 (9th Cir. 1983) (plaintiff, a top-ranked applicant for a police officer position based on oral and written tests as well as on physical agility, was held to unequal job standards because of the assumption that her feminine attributes would not qualify her for the job).

For an excellent discussion of the techniques frequently used to convey the message that women are unwelcome in the occupation and to undermine women's confidence and competence on the job, see Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683, 1762-69 (1998).

37. These stereotypes have long been reflected in the law. See, e.g., Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding jury selection system excluding women on the theory that women are "still regarded as the center of family and home life"); Muller v. Oregon, 208 U.S. 412, 420-21 (1908) (affirming the state's right to limit the working hours of women to no more than ten hours in one day on the grounds that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," and thus justifies restricting "the conditions under which she should be permitted to toil"); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (arguing that the natural and proper timidity and delicacy that belongs to the female sex makes women unfit for many of the occupations of civil life, including the legal profession) (Bradley, J., concurring); Bailey v. State, 219 S.W.2d 424, 428 (Ark. 1949) (upholding jury selection system excluding women on the theory that "[c]riminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady").

“bitch” and “whore,” taunts about the plaintiff’s supposed sexual conduct and preferences, incidents in which the plaintiff was required to “stand at attention and stare at posters of offensive, nude or partially clothed women,” and sexual invasions and assaults. The court noted that although other female cadets were harassed, “the frequency and severity of [the plaintiff’s] ill-treatment was accentuated because of her appearance” as a five-foot-three-inch-tall woman weighing one hundred pounds. By finding that the harassers’ characterization of the plaintiff as “feminine” and “pretty” constituted part of a pattern of invidious sex-based conduct, the court recognized the power of these adjectives, in a military context where typically masculine attributes such as physical strength and aggressiveness are valued while typically feminine traits are devalued, to demean and deride individuals who possess female and feminine traits.

In addition to singling out women based on their feminine physical appearance, harassers often attempt to reinforce stereotyped images of women in the traditional role of mothers and nurturers, thus implying that they do not belong in the male-dominated workplace. For example, in *Hellebusch v. City of Wentzville*, the plaintiff, who was Chief of Communications and Director of Support Services in the defendant’s police department, was consistently subjected to taunts that she should be “at home baking cookies and taking care of her children” and should be “doing woman’s work.” In *Zorn v. Helene Curtis, Inc.*, the harassers expressed a similar perception of women as domestic nurturers by requiring a management-level female plaintiff to perform tasks such as checking male colleagues into hotels, cleaning up after meetings, and cleaning supply closets. In each of these instances, the female plaintiff’s perceived capability and value in her chosen occupation was undermined.

39. Id. at 1388.
40. Id. The sexual invasions and assaults are discussed at greater length infra Part I.C.2.
41. Id. at 1389.
42. There are numerous cases of harassers’ attempting to portray women as lacking the physical strength or aggressiveness required in certain traditionally male occupations. See, e.g., Sims v. Montgomery County Comm’n, 766 F. Supp. 1052, 1066 (M.D. Ala. 1990) (recounting harassers’ belittling of women’s physical ability to serve as corrections officers); Berkman v. City of New York, 580 F. Supp. 226, 234 (S.D.N.Y. 1983) (describing similar conduct with respect to women firefighters), aff’d, 755 F.2d 913 (2d Cir. 1985). A similar tendency to devalue stereotypically feminine traits is apparent in sex discrimination cases outside of the hostile environment harassment context. For instance, in *Fadhl v. City & County of San Francisco*, 741 F.2d 1163 (9th Cir. 1983), the court recognized a cause of action for sex discrimination where the supervisors of a female police officer stated that she was “too much like a woman,” that “[a]fter work she can become feminine again,” and that she looked “too much like a lady.” Id. at 1165.
43. See Schultz, supra note 36, at 1755-69 (arguing that harassment that demeans women based on gender stereotypes is designed to perpetuate the idealized masculine image traditionally associated with certain jobs, thus preserving male privilege with respect to such jobs).
45. Id. at *4-5.
47. See id. at 1237. There are many examples of harassers invoking stereotypes of women as domestic nurturers. See, e.g., Sassaman v. Heart City Toyota, 879 F. Supp. 901, 909 (N.D. Ind. 1994) (plaintiff was told that she should be home with her children); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 663 (D. Minn. 1991) (female workers told they should be home with their children); Sones Morgan v. Hertz Corp., 542 F. Supp. 123, 126 (W.D. Tenn. 1981) (female manager told that “a woman’s place is in the kitchen”), aff’d *sub nom* Sones-Morgan v. Hertz Corp., 725 F.2d 1070 (6th Cir. 1984).
through invocations of "gendered expectations of what types of work are suitable for women to perform." 48

Another gender stereotype that harassers draw upon to demean women and devalue them as workers centers on the image of women as sexual objects who are available for men's sexual gratification. 49 In Morris v. American National Can Corp., 50 for instance, the plaintiff, the only female working in her department at a manufacturing company, was subjected to constant comments about her sex life, references to her performing oral sex, and jokes about her weight, her "boobs," and her "big butt." 51 On one occasion, she found a picture of a nude woman sitting on the edge of a bathtub touching her breasts, with a note saying "you should be doing this instead of a man's job." 52 At a staff meeting, her supervisor told her that she "might as well sit underneath his desk since that's where everybody says you do your best work." 53 On numerous occasions pornographic and offensive objects including a sausage with a note saying "bite me baby," a clay replica of a penis, women's underwear with a stained sanitary napkin, and "Playboy-type" pictures were placed on her desk. 54 The courts have encountered numerous similar instances of harassment based on stereotypes of women as sex objects. 55

In each of the cases discussed above, the plaintiffs experienced insult and degradation based on gender stereotypes. In some instances, the harassment sought to demean the target based on stereotypes of women as physically weak or incompetent. In other instances, the harassment was intended to portray women as more suited to stereotypically feminine roles as domestic nurturers or sexual objects than to the workplace. However, regardless of the particular gender stereotype invoked, in each instance the invocation of the gender stereotype served to perpetuate workplace gender hierarchies predicated on the traditional association between stereotypically masculine traits and historically male-dominated occupations. 56 In each instance, the harassment sought to "preserve the masculine image and male-dominated composition" of certain sectors of the employment market by denigrating traditionally female

48. Schultz, supra note 36, at 1754.
49. See Barbara A. Gutke, Understanding Sexual Harassment at Work, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 335, 352-53 (1992) (describing a phenomenon whereby "women, more than men in the same work roles are expected to be sex objects").
51. Id. at 1491.
52. Id.
53. Id.
54. Id.
56. For a further discussion of the stereotypically male traits that have traditionally been valued in the workplace in contradistinction to the stereotypically female traits that had traditionally been devalued in the employment market, see infra notes 449-450 and accompanying text.
attributes,\textsuperscript{57} thereby “marking and maintaining certain work as appropriate for men only.”\textsuperscript{58} Thus, harassment based on gender stereotypes plays an integral role in preserving notions of male domination in certain occupations.\textsuperscript{59} Although few courts have explicitly articulated the significance of these forms of harassment in perpetuating sex-based inequalities in the workplace, the foregoing cases demonstrate that they have had little difficulty recognizing that such harassment, which is laden with denigrating gender stereotypes, is a form of employment discrimination based on sex.

2. Disciplining Divergence: 
Penalizing Failure to Conform to Stereotypical Gender Roles

Another common characteristic of the sexual harassment directed at women is the tendency to penalize women who fail to conform to gender-based stereotypes and norms. Although it may seem paradoxical that women are penalized both for exhibiting stereotypically feminine traits and for failing to exhibit these traits, this paradox plays a central role in the workplace gender hierarchies that associate certain jobs with maleness and masculinity.\textsuperscript{60} As the cases below demonstrate, the courts have consistently recognized that harassment of women based on failure to conform to stereotypical gender roles constitutes a form of proscribed discrimination based on sex. In \textit{Sanchez v. City of Miami Beach},\textsuperscript{61} for instance, the court upheld a jury verdict in favor of a female police officer who was harassed by male co-workers for failing to conform to their notions of appropriate femininity. She was confronted with sexually explicit noises transmitted over the police radio, with sexually explicit materials displayed in the workplace, and with objects including “a soiled condom, a sanitary napkin, two vibrators, and a urinal device in her mailbox.”\textsuperscript{62} In addition, the harassers accused Sanchez of “being a lesbian, having male genitalia, and challenging male co-workers to various physical competitions.”\textsuperscript{63} The police department contended that the conduct was not harassment based on sex because it was based on the “[p]laintiff’s involvement in bodybuilding and her concurrent use of steroids” that had brought about a “change in physical condition and character.”\textsuperscript{64} The court rejected this argument and found that, since the harassment and hostility was based in large part on the plaintiff’s

\textsuperscript{57} Schultz, supra note 36, at 1762.
\textsuperscript{58} \textit{Id.} at 1769. As Professor Schultz explains, harassment based on gender stereotypes is used “to reinforce gender difference” in order to “claim work competence and authority as masculine preserves... [H]arassment is a central process through which the image of (certain) work as masculine is sustained.” \textit{Id.} at 1759.
\textsuperscript{59} See \textit{id.} at 1761 (“[H]arassment is a central mechanism through which men preserve their work... as domains of masculine mastery.”).
\textsuperscript{60} See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (describing a “catch-22” in which women are penalized in the workplace both for failing to conform to stereotypical notions of femininity and for exhibiting traits associated with stereotypical notions of femininity that are devalued in the employment market); see also Schultz, supra note 36, at 1735 (discussing harassers’ attempts to create “masculine-identified turf”).
\textsuperscript{62} \textit{Id.} at 977 (footnotes Fla. 1989).
\textsuperscript{63} \textit{Id.} at 977 n.9.
\textsuperscript{64} \textit{Id.} at 978.
failure to adhere to gender-based stereotypes of appropriate appearance and conduct, it constituted harassment based on sex within the scope of Title VII.65

In effect, the court recognized that the plaintiff’s physical strength, muscularity, and desire to display athletic prowess to others elicited the harassers’ hostility only because these traits, which are otherwise valued in physically demanding occupations such as law enforcement,66 were displayed by a woman. Thus, although the harassment did not evince hostility toward all women based on traits inherent in their biological sex, the court recognized that the plaintiff’s sex played an integral role in motivating the harassers’ reactions to her. In doing so, the court recognized the sex-based nature of conduct that penalizes a plaintiff for failing to conform to stereotypical gender roles.67

Other courts have also recognized the sex-based nature of harassment that targets and penalizes individuals for diverging from prescribed notions of appropriate female appearance and demeanor. For example, in Zorn v. Helene Curtis, Inc.,68 the court found that repeated comments urging the plaintiff to act more femininely, look sexier and less matronly, wear shorter skirts and dresses, and show more emotion amounted to hostile environment harassment based on the plaintiff’s sex.69 Likewise, in Danna v. New York Telephone Co.,70 the court upheld a female service technician’s hostile environment claim based on admonitions that she would fare better at work if she acted more “feminine and cutesy.”71 And in Huddleston v. Roger Dean Chevrolet, Inc.,72 the court recognized the actionable, sex-based nature of harassment directed at a female employee who wore pants and was taunted by male colleagues, who threatened, “we’re going to take your pants off and put a skirt on you” and “we’re going to take your clothes off to see if you are real.”73

In each of these cases, the harassment was not directed toward all women based on their biological status as women, but rather was aimed at particular women who diverged from gender-based norms by exhibiting certain traits commonly associated with men. Nonetheless, the courts readily concluded that this conduct was based on the target’s sex because the traits elicited the harassers’ hostilities only when exhibited by women. In these cases analyzing harassment directed at women, the courts have not construed the term “sex” as a rigid, unidimensional concept referring only to membership in one of two biological sexes. Rather, the courts have construed the notion of “sex” under Title VII as a more complex, multifaceted phenomenon, encompassing not only

65. See id. at 981.
66. See Schultz, supra note 36, at 1766 (discussing the importance of “physical virility” in the image of jobs such as police and construction work).
67. See id.
69. See id. at 1236-37.
71. Id. at 598. For another example of harassment based on failure to fulfill expectations of a stereotypically feminine appearance, see EEOC Decision No. 84-1, 1983 WL 22487, at *1 (E.E.O.C. Nov. 28, 1983) (finding that defendant harassed plaintiff based on lack of feminine appearance through comments such as “when are you going to put some meat on your ass?” and “when are you going to get something to put in that sweater?”).
72. 845 F.2d 900 (11th Cir. 1988).
73. Id. at 902.
biological sex, but also the gender-based stereotypes, expectations, and norms that are imposed upon and enforced against individuals because of their biological sex.

C. Sexualized Conduct as a Means of Asserting Gender Dominance

Sexual harassment directed at women is also frequently characterized by sexualized conduct that focuses intensively on the plaintiff's sex-related physical attributes and entails unwelcome sexual interactions including sexual epithets, comments, threats, and physical assaults. Although some such conduct is the product of a genuine pursuit of sexual relations with the target, in many instances the hostile, derogatory, and invasive character of the sexualized conduct reveals that such conduct represents not an expression of sexual desire, but rather an attempt to humiliate and degrade the plaintiff and to exert power and domination over her by exploiting her sexual vulnerabilities.

Numerous commentators have explored the significance of sexual conduct as a means of exerting power and enforcing patterns of gender dominance, both in the workplace and in other contexts. Recent scholarship has emphasized the power of sexual vulgarity and sexualized interactions to reinforce gender norms and gender hierarchies by feminizing and sexualizing female targets, thus reducing their status to that of sexual objects. This behavior simultaneously masculinizes and empowers male harassers by demonstrating, in deeply gender-laden terms, their power to sexually subordinate others. Thus, sexualized conduct, ranging from sexually vulgar epithets to sexual assaults, functions as a regulatory, disciplinary practice that "inscribes, enforces, and polices a particular view of who men and women should be. As such, it is a technology of gender discrimination." Most courts that have examined unwelcome sexual conduct directed at women have offered only cursory analyses of whether such conduct constitutes a form of discrimination based on sex. However, although

74. See, e.g., CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (identifying sexual harassment as an exercise of power); Craig, supra note 11, at 110 (noting that many courts have observed that sexual harassment serves the objective of "maintenance and abuse of power and dominance, rather than a real desire for sex").

75. Many commentators have documented the ways in which rape, an extreme form of unwelcome sexual conduct, serves as an expression of violence, power, and domination rather than sexual desire. See, e.g., SUSAN BROWNMEILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975) (characterizing rape as a violent means of asserting power over women's bodies); Peggy Miller & Nancy Biele, Twenty Years Later: The Unfinished Revolution, in TRANSFORMING A RAPE CULTURE 47, 49 (Emilie Buchwald et al. eds., 1993) ("Rape in all its forms ... is an act of violence, a violation of the victim's spirit and body, and a perversion of power."); Alexandra Stiglmayer, The Rapes in Bosnia-Herzegovina, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 82, 84-85 (Alexandra Stiglmayer ed., 1994) (explaining that rape serves to demonstrate power and to "humiliate and annihilate the enemy"); Jonathan Willens, Structure, Content, and the Exigencies of War: American Prison Law After Twenty-Five Years, 37 AM. U. L. REV. 41, 60 n.93 (1987) (arguing that prison rape is an exertion of power rather than an expression of sexual desire).

76. See Franke, supra note 11, at 761-72.

77. Id. at 771.

78. See id. at 692-94, 718 (discussing courts' lack of explicit analysis of the "because of sex" requirement).
their precise reasoning is often difficult to discern, their ultimate conclusions are not, as most courts have readily recognized the sex-based and sex-discriminatory nature of conduct that degrades women in deeply gendered terms and intimadates and subordinates them based on their vulnerability to sexual domination.

1. Humiliation and Ridicule Centered on Sex-Based Physical Attributes and Stereotypical Sexuality

Sexual harassment jurisprudence is rife with instances in which the harasser directs a barrage of gender-specific derogatory epithets at a plaintiff. These epithets frequently involve derisive references to women’s sexual organs and invoke stereotypes of female sexuality. These epithets diminish the target’s status in the workplace by portraying her as a sexual entity rather than as a capable co-worker. In many instances, harassers sexualize and demean their targets by referring to them with derogatory allusions to female genitalia such as “cunt” and “pussy,” thereby communicating to their targets that they are being isolated and demeaned in a manner inextricably linked to their status as women. In other cases, the harassers invoke stereotypical images of female sexuality, such as “slut,” “whore,” “tramp,” and “prostitute,” relegating their

---

79. Professor Franke identifies three theories that courts and commentators have implicitly or explicitly relied upon to explain the sex-discriminatory nature of unwelcome sexual conduct in the workplace. The first, a formal equality theory, emphasizes that the perpetrator would not have directed similar conduct toward a person of the opposite sex from the plaintiff, making the plaintiff’s sex a “but for” cause of the objectionable conduct. See id. at 705-14. The second, a sexuality-centered theory, holds that sexual conduct, by its nature, is debilitating and discriminatory in its effect on women because it reinforces perceptions of women as sexual objects. See id. at 714-25. The third, a subordination theory, posits that the discriminatory aspect of sexual conduct in the workplace lies in the fact that it is inevitably an exercise of power by a member of a dominant social group over a member of a subordinate social group. See id. at 725-29. Franke, however, persuasively argues that all three of these theories fail to recognize the sex-discriminatory nature of sexual harassment as a means of regulating and reinforcing gender norms. See id. at 771.

80. See Schultz, supra note 36, at 1766 & n.441; Franke, supra note 11, at 763-66.

81. See, e.g., Winsor, 79 F.3d at 998 (plaintiff called “whore”); DiLaurenzio v. Atlantic Paratrans, Inc., 926 F.3d 310, 312 (E.D.N.Y. 1996) (discussing supervisor’s telling plaintiff that she had a “big chest” after openly comparing the breast sizes of his female subordinates).

82. In some instances, the harasser does not invoke such crude, derogatory terms, but nonetheless objectifies the plaintiff’s intimate body parts. This conduct similarly imparts the harasser’s power to objectify the target and the target’s concomitant powerlessness to enforce the boundaries of her interactions with the harasser, resulting in a similar sense of helplessness and humiliation. See, e.g., King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 535 (7th Cir. 1990) (recounting assistant dean’s comments about assistant professor’s body and body parts); DiLaurenzio v. Atlantic Paratrans, Inc., 926 F. Supp. 310, 312 (E.D.N.Y. 1996) (discussing supervisor’s telling plaintiff that she had a “big chest” after openly comparing the breast sizes of his female subordinates).
targets to stereotypical roles as sexual beings available for the sexual gratification of men. Notably, the epithet "cunt" serves a dual role, defining the target in terms of her female genitalia through its definition as "a female pudenda," while also invoking stereotypical images of female sexuality through its definition as a "prostitute" or a "woman regarded as a sexual object."  

Significantly, these epithets defining women in terms of their genitalia and invoking stereotypical imagery of female sexuality are frequently combined with the epithet "bitch," another deeply gendered and sexualized term that has been defined as "a lewd or promiscuous woman" or a "malicious, bad-tempered, or aggressive woman." The term "bitch" simultaneously reduces the target's status to that of a sexual being characterized by her lewdness, and chastises the target for being overly aggressive. It is not surprising, therefore, that this combination of epithets is frequently directed at women who blur the traditional gender boundaries of the workplace by occupying positions formerly occupied by men and regarded as bastions of masculinity. These epithets, by defining their targets in sexualized terms and reducing them to sex objects, thus serve as a means of preserving and perpetuating the traditional workplace gender hierarchies that have reserved certain jobs for men.

The courts have consistently recognized the sex-based and sex-discriminatory nature of this conduct that sexualizes the target through references to the target's female genitalia and sexuality. Often, courts have treated the sex-based and sex-discriminatory nature of this conduct as self-evident, inferring the requisite nexus to the plaintiff's sex from the references to the target's sexual organs and sexuality, with no additional analysis of whether such conduct was, or could have been, directed at a target of the opposite sex. For example, in *Hellebusch v. City of Wentzville*, the court, without setting forth an explicit analysis, found that epithets such as "fucking bitch," "fucking whore," "slut," and "fucking cunt" were gender-based and sexist, and thus provided sufficient evidence of sex-based harassment to withstand a motion for summary judgment. Likewise, in *Perry-Baker v. Runyon*, the defendant


85. See, e.g., Winson, 79 F.3d at 998; *Burns*, 989 F.2d at 965; *Hall*, 842 F.2d at 1012; *Burrow*, 929 F. Supp. at 1197; *Needy*, 1997 U.S. Dist. LEXIS 11813, at *3 (plaintiffs called "cunts," "bitches," "whores"); *Perry-Baker*, 1996 U.S. Dist. LEXIS 15548, at *8 (plaintiff called "walking pussy" and "cunt").

86. WEBSTER'S NEW WORLD DICTIONARY 143 (3d College ed. 1988).

87. See, e.g., Winson, 79 F.3d at 998 (such epithets directed at a woman on an all-male sales force); *Burns*, 989 F.2d at 965 (such epithets directed at a woman in male-dominated electronic industry workplace); *Hall*, 842 F.2d at 1012 (such epithets directed at only female construction workers in the workplace).

88. See Franke, supra note 11, at 767; Schultz, supra note 36, at 1766-67.


90. Id. at *5-6.

91. See id. at *17-18.

continually made derogatory references to female genitalia and invoked stereotypical images of female sexuality, calling the plaintiff a “walking pussy,” “cunt,” “bitch,” “whore,” and “slut.”\(^93\) The court denied the defendant’s motion for summary judgment without requiring any evidence beyond the content of the harassment itself that the harassment was based on the plaintiff’s sex.\(^94\) In *Needy v. Village of Woodridge*,\(^95\) females were called “cunts,” “broads,” and “bitches” by male officers in the Woodridge Police Department.\(^96\) Again, the court found that the content of the harassment itself provided sufficient evidence of the sex-based nature of the conduct to survive a motion for summary judgment.\(^97\)

Each of these courts apparently recognized that, as one court succinctly stated, the sex-based nature of the conduct “speaks for itself” when the content of the conduct is so intertwined with aspects of female biology and sexuality that it demeans the target as a woman and could not rationally be directed at a man.\(^98\) When the gender-laden content of the harassment reveals this inextricable nexus between the conduct and the target’s sex- and gender-based attributes, these courts have found the sex-based nature of the harassment self-evident, and thus have found no need to undertake a mechanistic analysis of whether males were, or could have been, subjected to the same forms of derogatory conduct.

2. **Groping, Grabbing, and Other Actual and Threatened Invasions: Exploitation of Vulnerability to Sexual Subordination and Abuse**

Many forms of sexual harassment involve actual or threatened sexual assaults or invasions that intimidate and demean the target by portraying her as vulnerable to sexual domination by the harasser.\(^99\) In some instances, the harassment consists of verbal allusions to unwanted sexual acts with the plaintiff.\(^100\) In other cases, the harassing conduct goes beyond the verbal and involves humiliating, sexually suggestive pranks and physical acts that portray

---

\(^{93}\) Id. at *8.

\(^{94}\) See id.


\(^{96}\) Id. at *3.

\(^{97}\) See id.

\(^{98}\) Bales v. Wal-Mart Stores, Inc., 143 F.3d 1103, 1106-07 (8th Cir. 1998) (defendant made numerous sexually suggestive comments to the plaintiff).

\(^{99}\) See *RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 134 (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (“The purpose of sexual harassment is to reduce women to objects sexually vulnerable to men, and to reestablish the traditional power relationship between men and women.”).

\(^{100}\) See, e.g., DiLaurenzio v. Atlantic Paratrans, Inc., 926 F. Supp. 310, 312 (E.D.N.Y. 1996) (defendant said that before plaintiff’s wedding he should “give her a good screw”); EEOC Decision No. 84-1, 1983 WL 22487, at *3 (E.E.O.C. Nov. 28, 1983) (defendant constantly made specific comments and gestures evoking images of sex and rape such as “[k]eep bending and I’ll drive you home” and comments that he wanted to “cop a feel” while gesturing with his hands as if he were feeling her breasts); EEOC Decision No. 81-18, 1981 EEOC LEXIS 14, at *13-14 (E.E.O.C. April 3, 1981) (defendant told employee that because of her curly hair she looked like a sheep, and suggested that as a sheep, she could “get rammed”).
the target as an object available for the harasser’s sexual gratification.\textsuperscript{101} And in some cases, the harassment involves a component of sexual violence that renders the target an unwilling victim of forcible acts of sexual conquest, domination, and abuse, vividly illustrating the harasser’s power over the target and her sexuality.\textsuperscript{102} In each of these scenarios, the conduct imparts the message that the harasser, for reasons inextricably linked to his maleness and masculine sexuality, is in a position of power and control over the target’s sexuality, thus communicating the harasser’s position of dominance and the target’s position of subordination.\textsuperscript{103}

In analyzing these forms of unwanted sexual conduct directed at women, courts have recognized that the conduct represented a form of humiliation and intimidation used to relegate women to a subordinate position rather than an expression of sexual desire.\textsuperscript{104} In \textit{Dombeck v. Milwaukee Valve Co.},\textsuperscript{105} for instance, the defendant slapped the plaintiff’s buttocks, pushed her in a threatening manner, forcefully placed his foot in her crotch and wiggled it, and pulled on the waist of her pants to reveal her undergarments.\textsuperscript{106} Similarly, in \textit{Saum v. Widnall},\textsuperscript{107} the plaintiff, an Air Force cadet, was forcibly confronted with images of offensive, nude, or partially clothed women and was cast as the

\textsuperscript{101} See, \textit{e.g.}, \textit{Dombeck v. Milwaukee Valve Co.}, 40 F.3d 230, 233 (7th Cir. 1994) (defendant slapped plaintiff on the buttocks, approached her from behind while she was bending down, and placed his boot in her crotch and wiggled it); \textit{Ruf v. Metropolitan Life Ins. Co.}, No. 96-6376, 1997 WL 169267, at *5 (E.D. Pa. Apr. 7, 1997) (defendant touched plaintiff’s breasts, used sexual gestures in front of her and fondled her genitalia in front of her and others); \textit{Rivera v. Prudential Ins. Co. of Am.}, 95-CV-0829, 1996 WL 637555, at *1-2 (N.D.N.Y. Oct. 21, 1996) (defendant gyrated his groin area against one plaintiff’s arm, remarked about her breasts, leered at her, and made offensive noises around her, and grabbed another plaintiff’s buttocks, and told her how “horny” he was while grabbing his penis); \textit{Hernandez v. Wangen}, 938 F. Supp. 1052, 1055-56 (D.P.R. 1996) (defendant spanked plaintiff on the buttocks at an office social gathering and touched her neck “up and down” while making sexual remarks); \textit{Sanchez v. City of Miami Beach}, 720 F. Supp. 974 (S.D. Fla. 1989) (plaintiff received soiled condom, sanitary napkin, vibrators, and a urinal device in her mailbox). Even where the sexual conduct does not involve an explicit element of force or coercion, it tends to portray women as a passive sexual object of men’s active desires and advances, and thus operates to the detriment of the female target by casting her in a passive, submissive role that is at odds with notions of what constitutes a competent worker. See Kathryn Abrams, \textit{Title VII and the Complex Female Subject}, 92 Mich. L. Rev. 2479, 2480 (1994) (arguing that sexual harassment characterizes women “primarily as sexual objects, or as objects of sex-based derision, rather than as competent workers” and that “women are likely to perceive sexualized conduct as more of a threat to their professional and personal security than would their male counterparts”).


\textsuperscript{103} See \textit{Andrea Dworkin}, \textit{Intercourse} 150 (1987) (discussing how the roles of men and women in heterosexual intercourse, as articulated by society, “promote the power of men over women and . . . keep women sexually subjugated (accessible) to men”); \textit{Shere Hite, Women As Revolutionary Agents of Change: The Hite Reports and Beyond} 40 (1993) (arguing that the sexual act [intercourse] symbolizes “the male’s dominance, manipulation, and control over the female”). Hite argues that the prevailing intercourse-centered paradigm of sexual interactions casts women in a subordinate role. \textit{Id.} at 40-41, 55.

\textsuperscript{104} See \textit{Franke}, \textit{supra} note 11, at 734 (arguing that “[t]o the extent that desire plays a role in actionable sex harassment, it does so secondarily”).

\textsuperscript{105} 40 F.3d 230 (7th Cir. 1994).

\textsuperscript{106} \textit{See id.} at 233.

\textsuperscript{107} 912 F. Supp. 1384 (D. Colo. 1996).
"victim" in a simulated rape and exploitation scenario.\textsuperscript{108} In the course of this simulation, she was forced to her knees while a male cadet put his crotch in her face and made sexually explicit comments to her, soaked her fatigues with urine, and put a stick in her pants that he called her "masturbation stick."\textsuperscript{109} She was also subjected to a disproportionate number of sexually charged "beatiings," "interrogations," and incidents of "torture," which left her unconscious on two occasions and caused severe bruising and weight loss.\textsuperscript{110} The violence, hostility, and humiliation surrounding these sexual invasions plainly revealed the nature of the acts as a means of establishing the male harassers' power and dominance over the female targets.

However, even where the unwanted sexual acts are not suffused with such violence, the courts have analyzed the conduct as a form of humiliation and intimidation rather than as a product of sexual attraction. For example, in Pease v. Alford Photo Industries, Inc.,\textsuperscript{111} the harasser was in the habit of regularly touching and fondling his female employees on their shoulders, arms, necks, breasts, and thighs.\textsuperscript{112} The employees testified that this conduct made them feel "terrible, humiliated, nervous and tense,"\textsuperscript{113} "embarrassed," "nervous," and "low."\textsuperscript{114} Many described the harasser as "domineering" and "intimidating."\textsuperscript{115} In light of this testimony, the court characterized the conduct as harassment "based upon sex,"\textsuperscript{116} not because of any evidence that the harasser was genuinely attracted to the employees, but rather because of the clear indication that such conduct was "humiliating to his female employees."\textsuperscript{117}

As the foregoing cases demonstrate, the courts have recognized the sex-based and sex-discriminatory nature of varying forms of unwelcome sexual conduct. This conduct has included the use of sexually explicit epithets, threatened sexual invasions, humiliating, sexually suggestive pranks, depiction of the plaintiff as a sexual object, and violent sexual assaults. In many of these cases, the courts had no difficulty discerning the sex-based nature of the conduct, even in the absence of any evidence of genuine sexual desire toward the target. These courts have, at least implicitly, taken cognizance of the power of sexualized interactions to evoke and perpetuate stereotypical images of men as powerful and dominant and females as subordinate and submissive.\textsuperscript{118} Just as many courts have recognized that harassment that invokes gender stereotypes—either by derogating compliance therewith\textsuperscript{119} or by punishing divergence

\textsuperscript{108} See id. at 1388.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 1388-89.
\textsuperscript{111} 667 F. Supp. 1188 (W.D. Tenn. 1987).
\textsuperscript{112} See id. at 1196-97.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 1197-98
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 1201.
\textsuperscript{117} Id. at 1202.
\textsuperscript{118} See supra notes 102-103 (discussing patterns of male domination and female subordination symbolized and reinforced by heterosexual interactions).
\textsuperscript{119} See supra Part I.B.1.
therefrom—amounts to harassment based on sex, so too numerous courts have recognized that harassment that invokes images of the target’s sexuality to reduce the target to a sexual object and sexual subordinate likewise constitutes discrimination based on sex.

Accordingly, it is apparent that the cases analyzing sexual harassment directed at women have not adhered to a rigid, simplistic conception of “sex” in assessing whether the conduct could be characterized as conduct that occurred “because of” the plaintiff’s “sex” within the meaning of Title VII. Rather, the courts have recognized that harassment based on gender stereotypes and gender-subordinating sexual interactions plays an integral role in perpetuating patterns of male domination and female subordination that characterize workplace gender hierarchies. Consequently, the courts have developed an understanding of sex-based discrimination that recognizes the interrelationships between gender stereotypes, sexual interactions, and sex discrimination in the employment market and have found that actionable, sex-based harassment was afoot in a broad range of circumstances where the plaintiff was harassed based on stereotypical notions of femininity or female sexuality.

Based on this approach, the courts have found Title VII’s “because of . . . sex” requirement to be satisfied whenever the nature of the harassment reveals that it is based on aspects of the target’s personality that are inextricably related to her sex. They have not required any evidence that such conduct affected all women uniformly; nor have they insisted on proof that men were treated differently. As the following section demonstrates, however, the courts have taken a markedly different approach to analyzing the sex-based nature of conduct directed at men.

II. SAME-SEX SEXUAL HARASSMENT CASES: DIVERGENT JUDICIAL RESPONSES TO SIMILAR SEX-BASED CONDUCT

This part examines the cases addressing harassment directed at men by men. In the cases examining harassment directed at women, the courts have consistently acknowledged the sex-based nature of harassment involving gender stereotypes and sexual subordination. However, in the context of harassment directed at men, the courts have examined similar conduct yet have taken an array of different approaches to analyzing whether the conduct is based on the target’s sex. As this part demonstrates, the conduct directed at men reveals striking parallels to the types of conduct directed at women. Male-on-
male harassment frequently invokes gender stereotypes to demean the target for possessing traditionally devalued feminine traits and to penalize the target for failing to conform to expected gender roles. It also frequently uses sexualized conduct to feminize the target and relegate him to subordinate status based on his vulnerability to sexual domination by more masculine males.

Despite the similarities between the conduct in these cases and the conduct in the opposite-sex sexual harassment cases, many courts have applied the "because of . . . sex" language far more strictly than in cases involving harassment directed at women. These courts have implicitly relied on a conception of the target's "sex" that is limited to the target's status as a member of the male biological sex. This conception ignores the numerous aspects of an individual's sex identity, including conformity vel non to gender-stereotyped notions of masculinity, projected and perceived sexuality, and vulnerability to sexual domination, that are inextricably intertwined with and affected by the target's biological sex, and that the courts have acknowledged as relevant aspects of sex in the context of harassment directed at women.

A. Divergent Judicial Responses

The Supreme Court recently addressed the issue of same-sex sexual harassment for the first time in its landmark decision Oncale v. Sundowner Offshore Services, Inc. However, for nearly a decade before Oncale, the lower courts had been grappling with the issue of same-sex sexual harassment, producing what the Supreme Court described as a "bewildering variety of stances" in response to such conduct. These divergent responses are discussed below.

1. The Categorical Rejection of All Same-Sex Harassment Claims

The most restrictive line of cases addressing same-sex sexual harassment categorically precludes any claims challenging such conduct. One of the

127. Id. at 1002.
128. The lower courts, in fact, had addressed two distinct categories of same-sex hostile environment sexual harassment. The first involved openly gay male harassers targeting male colleagues or subordinates. See, e.g., Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996); EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), aff'd, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981). The second category addressed male-on-male sexual harassment perpetrated by men who were not known to be gay. See, e.g., Gibson v. Tanks, Inc., 930 F. Supp. 1107 (M.D.N.C. 1996); Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va. 1995), aff'd, 94 F.3d 641 (4th Cir. 1996); Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995); Vandevert v. Wabash Nat'l Corp., 887 F. Supp. 1178 (N.D. Ind. 1995). The first category of cases has been relatively unproblematic for the courts because in such cases the harasser's known attraction to persons of the target's sex supports the inference of sex-based causation in a manner that "closely parallel[s]" the inference in some opposite-sex cases. Franke, supra note 11, at 697. This Article, therefore, focuses on the second category of cases, which do not involve any inference of sexual attraction. These cases have proven far more problematic and divisive on the question of whether the humiliation and intimidation are based on the target's sex. See id.
clearest examples of this categorical rejection of same-sex sexual harassment claims is found in the Fifth Circuit Court of Appeals' opinion in Garcia v. Elf Atochem North America.\textsuperscript{129} In Garcia, the court addressed allegations that the plaintiff's supervisor, the plant foreman, approached the plaintiff from behind, "reach[ed] around and grab[bed] [the plaintiff's] crotch area and ma[de] sexual motions from behind," simulating an act of sodomy on the plaintiff.\textsuperscript{130} The employer had received prior complaints reporting similar conduct on the part of the foreman, but had viewed the conduct as "horseplay" and thus had not taken any action beyond counseling him that this conduct was "not appropriate for a supervisor."\textsuperscript{131} In a three-sentence paragraph addressing the same-sex sexual harassment issue, the court concluded that:

[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination. . . . Thus, [the acts complained of] could not in any event constitute sexual harassment within the purview of Title VII.\textsuperscript{132}

The court thus characterized the conduct as merely "sexual," and treated harassment involving sexual conduct and conduct involving gender discrimination as mutually exclusive categories without acknowledging the potential ways in which sexual conduct can be used to perpetuate and enforce gender stereotypes and gender-based hierarchies.\textsuperscript{133}

The court was correct that the mere presence of sexual overtones does not render conduct actionable under Title VII. After all, the statutory language does not reach all conduct that is related to "sex" in the sense of sexual activity, but rather addresses conduct that is directed at an individual "because of such individual's . . . sex."\textsuperscript{134} The statute thus requires that the conduct be based on the plaintiff's sex as an individual characteristic and not merely on a depiction of sex as a form of human activity, however graphic or offensive it might be.

\textsuperscript{129} 28 F.3d 446 (5th Cir. 1994).
\textsuperscript{130} Id. at 448.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 451-52 (internal quotations omitted). In support of this analysis, the Garcia court cited only its own prior unpublished opinion in Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993), and Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988). See Garcia, 28 F.3d at 448. Although Goluszek presented a distinct rationale for rejecting the same-sex harassment claim raised in that case, see infra Part II.A.2., Garcia appears to have cited Goluszek only for its result and not for its reasoning, as Garcia does not discuss Goluszek's reasoning. Subsequent cases have disputed whether the portion of Garcia addressing same-sex sexual harassment constituted merely dictum rather than a holding of the case, given that the court had already found that entry of summary judgment was appropriate based on the statutory definition of employer and on principles of employer liability. See, e.g., Oncle v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996) (citing Garcia, 28 F.3d at 451-52), rev'd, 118 S. Ct. 998 (1998). However, regardless of whether its analysis of the issue is properly viewed as a holding or as dictum, Garcia is instructive as an example of judicial responses to same-sex harassment.
\textsuperscript{133} See Garcia, 28 F.3d at 451-52.
\textsuperscript{134} 42 U.S.C. § 2000e-2(a)(1) (1994); see also Franke, supra note 11, at 715-16 (asserting that it "is rather disingenuous to [contend] that sexual harassment is harassment 'because of sex' by arguing that the 'sex' in Title VII refers to a class of human activity and not the identity category" and urging that the more principled approach is to develop an understanding of the role that sexual activity plays in sexual harassment).
The fallacy of the *Garcia* court’s logic lies in its assumption that conduct with sexual overtones and conduct evincing a gender bias are two mutually exclusive categories, and thus that the “sexual” nature of the conduct obviated the need for further inquiry into whether the conduct was also based on the plaintiff’s sex. The court failed to acknowledge the possibility that when a harasser grabs an unwilling plaintiff’s genital area and makes “sexual motions from behind” suggestive of penetrating the plaintiff, the conduct can impart a powerful gender-based message about the harasser’s sexual dominance and the target’s sexual vulnerability, thereby humiliating, intimidating, and demeaning the target in ways that may be integrally related to his projected and perceived sex and gender identity.

*Garcia*’s cursory account of the challenged conduct and its lack of discussion of the surrounding workplace dynamics make it difficult to assess the significance of the conduct before the court. However, the court erroneously assumed that because the sexual conduct occurred between two males it did not implicate the target’s sex- and gender-based individual characteristics. By categorically presuming that interactions between two males could not be based on aspects of the target’s sex, the *Garcia* court failed to recognize the ways in which sexuality and sexual aggression are frequently used to establish and maintain workplace gender hierarchies that rely on idealized images of masculinity.135 Because acts of sexual aggression and domination are stereotypically associated with males, masculinity, and male sexuality, while sexual passivity and vulnerability to sexual domination are stereotypically associated with females, femininity, and female sexuality, unwelcome sexual conduct can serve as a powerful means of accentuating gender-based differences between more masculine males and less masculine males.136

The *Garcia* court, however, by treating all males monolithically and presuming that one male could not target another based on factors related to the target’s sex, ignored the gender-based hierarchy that allocates power and privilege based on masculinity. The *Garcia* court also ignored the ways in which sexuality can be used to assert and maintain the superior masculinity of the sexual aggressor in contraposition to the lesser masculinity associated with the target. The court thus departed from the significant body of law in the opposite-sex sexual harassment context that recognizes the power of actual, threatened, and simulated sexual invasions to intimidate, humiliate, subordinate, and demean the target in sex-defined terms for reasons related to the target’s gender identity. Instead of examining the notions of sex-based causation emanating from the broader sexual harassment jurisprudence, the *Garcia* court simply presumed that the conduct was necessarily devoid of sex- and gender-based implications merely because it was perpetrated by one biological male

---

135. See Schultz, supra note 36, at 1755-62.
136. See supra notes 101-103 and accompanying text (discussing associations between maleness, masculinity, and sexual dominance and aggression); see also infra Part II.B.2. (examining role of unwelcome sexual conduct in asserting the dominance of masculinity and in subordinating less masculine males to more masculine males).
against another. Thus, the court categorically excluded such male-on-male harassment from the purview of Title VII.\textsuperscript{137}

2. \textit{Ignoring the Invocation of Gender Stereotypes and Perpetuating the Myth of the Gender Monolith: The Requirement of an Anti-Male Environment}

In a distinct line of cases, courts confronting allegations of male-on-male sexual harassment have held that such conduct cannot constitute actionable sex harassment unless it occurs in the context of an “anti-male environment in the workplace.”\textsuperscript{138} This line of cases originated with \textit{Goluszek v. Smith}.\textsuperscript{139} In that case the plaintiff, an electronic maintenance mechanic at a processing plant, alleged that his co-workers had tormented him about the fact that he did not have a wife or girlfriend, urged him to “get some of that soft pink smelly stuff that’s between the legs of a woman,” questioned him about whether he had gotten any “pussy” or had oral sex, accused him of being gay, confronted him with pictures of nude women, poked him in the buttocks with a stick, and talked to him about “butt fucking in the ass.”\textsuperscript{140} The court acknowledged that the harassment was pervasive throughout Goluszek’s employment and acknowledged that “a fact-finder could reasonably conclude that if Goluszek were a woman [the employer] would have taken action to stop the harassment.”\textsuperscript{141}

The court found, however, that the harassment directed at Goluszek was not actionable under Title VII because it was directed at a male by other males. The court reasoned that “[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful that results in discrimination against a discrete and vulnerable group.”\textsuperscript{142} The “sexual harassment that is actionable under Title VII,” the court continued, “is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person. . . In effect, the offender is saying by words or actions that the victim is inferior because of the victim’s sex.”\textsuperscript{143} The court then stated that “Goluszek was a male

\textsuperscript{137} Other cases have categorically held that same-sex sexual harassment is not actionable under Title VII. See \textit{Schoiber v. Emro Mfg. Co.}, 941 F. Supp. 730, 738 (N.D. Ill. 1996) (“Same-gender sexual harassment does not and cannot occur as a matter of law ‘because of’ the victim’s ‘sex.’”); \textit{Larry v. North Miss. Med. Ctr.}, 940 F. Supp. 960, 963 (N.D. Miss. 1996) (rejecting same-sex sexual harassment claim based on Garcia’s holding), aff’d in part sub nom. Larry v. Grice, 156 F.3d 181 (5th Cir. 1998); \textit{Mayo v. Kiwest Corp.}, 898 F. Supp. 335, 337 (E.D. Va. 1995) (citing Garcia for the proposition that “same sex discrimination is not actionable under Title VII because it does not amount to discrimination because of the plaintiff’s gender”), aff’d, 94 F.3d 641 (4th Cir. 1996); \textit{Hopkins v. Baltimore Gas & Elec. Co.}, 871 F. Supp. 822, 834 (D. Md. 1994) (“Title VII does not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender.”), aff’d, 77 F.3d 745 (4th Cir. 1996).


\textsuperscript{139} Id.

\textsuperscript{140} Id. at 1453-54.

\textsuperscript{141} Id. at 1455-56.

\textsuperscript{142} Id. at 1456.

\textsuperscript{143} Id. (quoting Note, \textit{Sexual Harassment Claims of Abusive Work Environment Under Title VII}, 97 \textit{Harv. L. Rev.} 1449, 1451-52 (1984)).
in a male-dominated environment and that “each and every one of the figures” involved in the harassment “was a male.”\textsuperscript{144} The court thus concluded that there was no indication that the workplace environment treated males as inferior.\textsuperscript{145} Accordingly, the court found that although “Goluszek may have been harassed ‘because’ he is a male . . . that harassment [is] not of a kind which created an anti-male environment in the workplace.”\textsuperscript{146} The court therefore concluded that, although Goluszek would have a cause of action under a “wooden application of the verbal formulations created by the courts,” his claim was not “consistent with the underlying concerns of Congress” and thus should not be permitted to proceed.\textsuperscript{147} Thus, in the view of Goluszek court, harassment that occurs because of one’s status as a male is not actionable unless it occurs in the context of an anti-male environment.

Likewise, in Ashworth v. Roundup Co.,\textsuperscript{148} the court confronted allegations that the plaintiff’s male supervisor had harassed him with sexually explicit comments and had “goosed” him by sticking a steel object between his buttocks.\textsuperscript{149} The plaintiff’s supervisor called the plaintiff “homo” or “faggot,” repeatedly threatened to “butt fuck” him, and frequently made suggestive comments such as “how come whenever I get around you, I quiver.”\textsuperscript{150} On one occasion the supervisor told the plaintiff that he had a “nice ass” and on another the supervisor stated that he wanted to “touch pee-pees” with the plaintiff in the bathroom.\textsuperscript{151} The court, citing Goluszek and Garcia, held that although the plaintiff may have been harassed “because” he is a male, he was not entitled to assert a cause of action under Title VII because he had not established “that his workplace was other than predominantly male or that an anti-male environment was created.”\textsuperscript{152}

In Vandeventer v. Wabash National Corp.,\textsuperscript{153} the court relied on similar reasoning to conclude that a showing of oppression by one dominant gender

\begin{itemize}
  \item \textsuperscript{144} See id.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id. This reasoning has been criticized extensively. As one court explained: [T]he Goluszek court built its understanding of Congressional intent upon a foundation of quicksand. Its basis for determining that Title VII did not allow claims for this type of same-sex harassment was that “[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.” For this proposition, the court cited a note, “Sexual Harassment Claims of Abusive Work Environment Under Title VII,” 97 Harv. L. Rev. 1449, 1451-52 (1984). Although this part of the note admirably examines conceptual frameworks of sexual harassment, it does not explore Congress’s intent in passing Title VII. Thus, the Goluszek court had no basis for its gloss on Title VII’s legislative history. Not only is it inappropriate to delve into Congressional intent when the statute’s language is clear, Goluszek is simply not persuasive or reliable authority for interpreting Title VII’s provisions on sex discrimination. In general, its progeny are similarly flawed.
  \item \textsuperscript{147} Id. at 942-94.
  \item \textsuperscript{148} 897 F. Supp. 489 (W.D. Wash. 1995).
  \item \textsuperscript{149} See id. at 490.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id. at 490-96.
  \item \textsuperscript{153} 867 F. Supp. 790 (N.D. Ind. 1994), aff’d on reconsideration, 887 F. Supp. 1178 (N.D. Ind. 1995).
\end{itemize}
was necessary in order to sustain a sexual harassment claim under Title VII. In that case, although there was “no evidence or even allegation that either [the harasser or the target] was homosexual or believed the other to be,” the harasser made repeated references to the plaintiff’s performing oral sex on another man. According to the plaintiff, the harasser asked him to “drop down,” referred to him as “dick sucker,” instructed him to “crawl under the table,” asked whether the plaintiff could perform fellatio without his false teeth, and invited the plaintiff to accompany him to a gay bar. Citing Goluszek’s holding that a finding of gender discrimination requires “an atmosphere of oppression by a ‘dominant’ gender,” the court rejected the plaintiff’s claim on the grounds that there was no showing of an “anti-male” atmosphere” in the workplace. Thus, the court found, “[t]he record does not support a reasonable inference that [the harasser] ‘harassed’ [the plaintiff] because he was a man. This was not actionable sexual harassment.”

In affirming its decision on reconsideration, the court elaborated on several aspects of its opinion. The court explained that its holding did not preclude actions for same-sex sexual harassment under all circumstances, but rather was a “fact-specific” determination based on the record before it. The court reiterated that harassment based on homosexuality was not actionable, but acknowledged that “being homosexual does not deprive someone of protection from sexual harassment under Title VII, it is merely irrelevant to it. The issue is and remains whether one is discriminated against because of one’s gender.”

The court then countenanced the possibility of a male harassing another male based on sex. As the court explained, “a man can state a claim under Title VII for sexual harassment by another man only if he is being harassed because he is a man; the relative genders are irrelevant.” Furthermore, implicitly recognizing that sexual harassment may be based on hostility and need not be based on attraction, and that gender-based hostilities may arise between members of the same biological sex, the court stated that, “[t]here may or may not be homosexual aspects to such harassment. There may or may not be a prejudice against one’s own gender involved.” The court further acknowledged that although sexual behavior did not in itself amount to conduct based on “sex” within the meaning of Title VII, such behavior was frequently involved in sexual harassment proscribed by Title VII and could serve as a means of expressing an actionable gender bias. In discussing this point, the court noted that the words “sex” and “sexual” in this context “create

---

155. See Vandeventer, 867 F. Supp. at 796.
156. Id.
157. Id.
158. Id.
160. Id. at 1180-81.
161. Id. at 1180.
162. Id. at 1181.
163. Id.
164. See id.
definition problems because they can mean either ‘relating to gender’ or ‘relating to sexual/reproductive behavior.’” These concepts, the court accurately noted,

are not the same, but are certainly related and easily confused. Title VII only recognizes harassment based on the first meaning, although that frequently involves the second meaning. However, harassment which involves sexual behavior or has sexual behavior overtones . . . but is not based on gender bias does not state a claim under Title VII.\(^{165}\)

However, despite these insights into the possibility of gender-based biases among members of the same biological sex and into the potential role of sexual conduct in expressing these biases, the court failed to analyze whether the plaintiff had been targeted for reasons related to his gender, such as his nonconformity with gender stereotypes. The court also failed to examine whether he had been intimidated and demeaned in a manner inextricably intertwined with his status as a male, thus implicating the very definition of “sex” that the court had identified as protected under Title VII. Rather, the court, adhering to the prior holding requiring an anti-male atmosphere,\(^{166}\) rejected the plaintiff’s claim on the grounds that there was “no evidence that the abuse was based on the ‘harasser’s’ disdain for the victim’s gender.”\(^{167}\) Thus, like the courts in Goluszek and Ashworth, the court in Vandeventer refused to recognize a sexual harassment claim absent some indication of gender-based hostility to males as a class rather than toward an individual male based on aspects of his gender identity.\(^{168}\)

The analysis in these cases stands in stark contrast to the analysis in the opposite-sex cases. In the context of sexual harassment directed at women by men, the courts have not required any showing that the work environment was hostile toward all females. Instead, the courts have recognized a cause of action for sex-based harassment when the circumstances of the harassment revealed that it was based on the target’s individual sex- and gender-related traits such as possession of stereotypically feminine attributes, divergence from prescribed gender roles, and vulnerability to sexual domination.\(^{169}\) Contrary to the opposite-sex harassment jurisprudence recognizing that the rights conferred under Title VII are individual rights,\(^{170}\) these cases effectively mandate that the

165. See id.
168. The facts in Vandeventer, as described by the court, are inconclusive as to whether the plaintiff was, in actuality, targeted for reasons related to his maleness or masculinity. What is significant is that the court did not examine whether the harassment was based on the target’s individual sex-based attributes, but rather examined only whether there was evidence of animus toward males in general.
169. See supra Part I.B-C.
170. See Connecticut v. Teal, 457 U.S. 440, 458 (1982) (holding that Title VII provides a cause of action to any individual who is subjected to adverse treatment based on a protected trait regardless of whether others were treated adversely based on that trait).
challenged conduct “operate, in some respect, against all members of the protected group.”

This line of cases requiring a general hostility toward males as a biologically defined class effectively views all males monolithically and denies a cause of action to males who are targeted based on individual sex-related traits such as deviance from stereotypes of appropriately masculine demeanor. In an approach that diverges dramatically from that of the cases addressing sexual harassment directed at women, these courts fail to recognize the numerous sex- and gender-based individual attributes that distinguish males from one another, distributing them across a spectrum and defining their status relative to one another on workplace gender hierarchies. By construing the notion of “sex” narrowly to refer only to the plaintiff’s membership in one of two opposing biologically defined sexes and not to the array of individual sex-based attributes that affect each person’s interactions with others, this line of cases imposes rigid restrictions on Title VII’s “because of sex” language that have not been imposed in cases brought by female plaintiffs.

3. Missing the Significance of Sexualized Conduct: Misplaced Emphasis on Sexual Desire and the Requirement of Homosexual Attraction

In yet another line of reasoning that has emerged from the lower courts’ same-sex harassment jurisprudence, the courts have focused on the harasser’s sexual orientation, thus implicitly requiring an element of potential sexual attraction to support a finding of the requisite sex-based causation. By focusing on the harasser’s sexual orientation, these courts have construed Title VII’s “because of sex” requirement narrowly to denote only conduct prompted by sexual attraction. They have thereby excluded numerous other forms of conduct that are based on aspects of the target’s projected and perceived “sex” and gender identity, such as possession of traditionally devalued, stereotypically feminine traits, divergence from gender-based stereotypes, and vulnerability to sexual domination.

One of the clearest examples of this reasoning is found in the Fourth Circuit Court of Appeals’ opinion in McWilliams v. Fairfax County Board of Supervisors. In that case, the court examined a Title VII claim brought by a male automotive mechanic alleging that his co-workers, who identified themselves as the “lube boys,” had subjected him to a campaign of sexually humiliating and demeaning treatment. They teased him about his inability to

171. Abrams, supra note 101, at 2514; see also Fleenor v. Hewitt Soap Co., No. C-3-94-182, 1995 WL 386793 at *3 (S.D. Ohio 1995) (dismissing same-sex harassment claim on the grounds that male-on-male harassment “is not actionable under Title VII in the absence of an allegation that an anti-male environment was created thereby”), aff’d, 81 F.3d 48 (6th Cir. 1996).
172. For further discussion of the gender stereotypes at play in these cases, see infra notes 449-450 and accompanying text.
173. For a discussion of workplace gender hierarchies based upon associations between certain occupations and idealized notions of masculinity, and the resulting subordination of those who compromise the masculine image, see supra notes 56-59 and accompanying text.
174. 72 F.3d 1191 (4th Cir. 1996).
“get” a woman; repeatedly tied his hands together, blindfolded him, forced him to his knees; exposed themselves to him; and simulated oral and anal sexual acts upon him by inserting a finger into his mouth and placing a broomstick against his anus.\textsuperscript{175} Moreover, these co-workers offered him money for sex and flicked their tongues at him while saying “I love you.”\textsuperscript{176} One co-worker put a condom in his food.\textsuperscript{177}

The \textit{McWilliams} court rejected the plaintiff’s assertion that this conduct amounted to actionable sex harassment, reasoning that both the harassers and the target were heterosexual males, and that harassment of one heterosexual male by another cannot constitute harassment “because of . . . sex.”\textsuperscript{178} As the court explained, “to interpret Title VII to reach that conduct when only heterosexual males are involved as harasser and victim would be to extend this vital statute’s protections beyond intentional discrimination ‘because of the offended worker’s ‘sex’ to unmanageably broad protection of the sensibilities of workers simply ‘in matters of sex.’”\textsuperscript{179} The court theorized that because none of the harassers was attracted to persons of the target’s biological sex, the conduct must have been based on factors other than sex, such as the target’s “known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct,” or the harassers’ “sexual perversion, or obsession, or insecurity.”\textsuperscript{180} Thus, the court effectively reduced sex-based causation to a paradigm based on sexual desire.\textsuperscript{181}

Similarly, in \textit{Martin v. Norfolk Southern Railway Co.},\textsuperscript{182} the plaintiff, a mechanical supervisor in a railway yard, was subjected to a campaign of epithets and acts designed to humiliate and demean him as insufficiently masculine. The harassers called his girlfriend “ugly,” asked Martin “where he was getting his [sex],” described him in feminizing terms such as “pretty” and “cute,” and draped a piece of paper around his head as if it were a scarf.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{175} See \textit{id.} at 1193.
\item \textsuperscript{176} See \textit{id.}
\item \textsuperscript{177} See \textit{id.}
\item \textsuperscript{178} See \textit{id.} at 1195-96.
\item \textsuperscript{179} \textit{Id.} at 1196.
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} Numerous other cases exemplify the desire-centered paradigm explicated in \textit{McWilliams}. Compare, e.g., \textit{Yeary v. Goodwill Indus.-Knoxville, Inc.}, 107 F.3d 443 (6th Cir. 1997) (upholding claim against homosexual supervisor); \textit{Wrightson v. Pizza Hut of Am.}, 99 F.3d 138 (4th Cir. 1996) (same); \textit{Tietgen v. Brown’s Westminster Motors, Inc.}, 921 F. Supp. 1495, 1497 (E.D. Va. 1996) (sustaining sexual harassment claim where harasser’s homosexuality revealed that his sexual overtures “were in earnest”); \textit{and EEOC v. Walden Book Co.}, 885 F. Supp. 1100 (M.D. Tenn. 1995) (upholding claim against homosexual supervisor); \textit{with, e.g., Ward v. Ridley Sch. Dist.}, 940 F. Supp. 810, 811, 813 (E.D. Pa. 1996) (citing \textit{McWilliams} and granting summary judgment for defendant on grounds that harassers were not shown to be homosexual, despite plaintiff’s allegations that harasser had “exposed his anus and genital area to [the plaintiff] and solicited general contact” based on the plaintiff’s “less than stereotypical maleness” and his “specific male attributes and qualities”), \textit{aff’d}, 124 F.3d 189 (3d Cir. 1997); \textit{and Gibson v. Tanks, Inc.}, 930 F. Supp. 1107, 1008-09 (M.D.N.C. 1996) (citing \textit{McWilliams} and granting defendant’s motion for judgment as a matter of law, in case where plaintiff was subjected to sexual epithets and “poked and grabbed . . . in the buttocks and genital area,” on the grounds that both harasser and target were heterosexual males). For an insightful critique of the flawed theoretical underpinnings of these cases predicated on sexual attraction, see \textit{Franke, supra} note 11, at 734-47.
\item \textsuperscript{182} 926 F. Supp. 1044 (N.D. Ala. 1996).
\item \textsuperscript{183} \textit{Id.} at 1046-47.
\end{enumerate}
\end{footnotesize}
Moreover, the harassers offered to expose their penises to him, asked to see his penis, and grabbed his legs, genitals, and buttocks.\textsuperscript{184} One of the harassers, who was the plaintiff's immediate supervisor, told the plaintiff that he would like to "bend him over a chair and have sex with him."\textsuperscript{185} Subsequently, another employee held the plaintiff in a bent-over position while the supervisor "attempted to stick a broom handle into [the plaintiff's] anus."\textsuperscript{186} The court found that "without the presumption of sexual gratification, there is no evidence that the harasser intentionally singled out the victim for offensive treatment because he was male. Thus there is no sex discrimination. . . . under Title VII."\textsuperscript{187}

This focus on the harassers' sexual orientation diverges markedly from established jurisprudence in the opposite-sex cases. In the context of opposite-sex harassment, the courts have not required any showing that the harasser was attracted to persons of the target's sex in order to support an inference that the conduct was motivated by some aspect of her sex. Rather, in that context, the courts have recognized that sex-based conduct need not arise from sexual desire, but also may arise from hostilities related to aspects of the target's sex- and/or gender-related attributes.\textsuperscript{188} Moreover, unlike the Fourth Circuit's opinion in \textit{McWilliams}, the opposite sex cases have not sought to isolate other traits of the target and to attribute the objectionable conduct to those traits rather than to the target's sex. To the contrary, the opposite-sex jurisprudence has recognized that frequently, because of gender norms that prescribe different standards of appearance, demeanor, and sexual expression for men and women, certain traits that are tolerated or even encouraged in members of one sex become a basis for hostility, intimidation, and ridicule when exhibited by members of the opposite sex.\textsuperscript{189} Accordingly, the opposite-sex cases have recognized the sex-based nature of harassment that is directed at a target based on individual attributes that become grounds for hostility only when they are exhibited by a person of the target's sex. This recognition of the sex-related nature of individual attributes that assume their significance only in light of gender norms imposed upon persons of the targets sex stands in stark juxtaposition to the Fourth Circuit's approach of viewing those attributes as wholly independent of the target's sex and of recognizing the relevance of the target's sex only when it gives rise to a sexual attraction.

\textsuperscript{184} \textit{See id.} at 1047.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id. at} 1049-50.
\textsuperscript{188} \textit{See supra} Part IB-C. (discussing cases recognizing sex-based nature of conduct that is not based on sexual desire, but rather arises from adverse perceptions of stereotypically feminine traits, from hostility toward individuals who transgress gender norms, or from an intent to humiliate, intimidate, and demean the target by exploiting gender-based vulnerability to sexual domination).
\textsuperscript{189} \textit{See supra} Part I.B. (analyzing cases finding actionable sex-based harassment where female plaintiffs are penalized for exhibiting otherwise valued, stereotypically masculine traits).
4. **Acknowledging the Role of Gender Stereotypes and Sexualized Conduct: Recognition of the Actionable Sex-Based Nature of Same-Sex Sexual Harassment**

In contrast to the cases discussed above that have restricted the cause of action for same-sex harassment on various grounds, several cases have analyzed same-sex harassment claims in a manner similar to that found in the opposite-sex cases. These cases have focused only on whether factors related to the plaintiff’s sex played a causal role in bringing about the conduct directed at him in the work environment. For instance, in *Quick v. Donaldson Co.*,190 the plaintiff, who worked as a welder in a male-dominated production plant, was subjected to a continuing pattern of verbal and physical abuse in which at least twelve different male co-workers intentionally grabbed and squeezed his testicles on some one hundred occasions in a two-year period. The practice of “intentional[ly] grabbing and squeezing . . . another person’s testicles” was a relatively common occurrence in that workplace, and was referred to as “bagging.”191 On one occasion, one worker held the plaintiff’s arms while another grabbed and squeezed his left testicle hard enough to produce swelling and bruising.192 In addition to these physical assaults, the harassers subjected the plaintiff to a pattern of verbal abuse centered on portraying the plaintiff as a homosexual although there was no indication that he, in fact, was.193 The harassers affixed tags to the plaintiff’s forklift and belt loop that referred to a sexual act with a cucumber, described him as a “Pocket Lizard Licker,” attached stickers to him reading “Gay and Proud,” and wrote the word “queer” on his work identification card.194

The trial court, echoing the analysis in *Goluszek* and its progeny discussed above,195 held that the conduct did not give rise to a sexual harassment claim under Title VII because the plaintiff had not proven the existence of an “anti-male or predominantly female environment making males a disadvantaged or vulnerable group in the workplace and treating female employees differently and more favorably.”196 In the absence of such proof, the trial court found, the conduct could only be viewed as the product of personal animosities and could not be viewed as conduct based on the plaintiff’s sex.197 The Court of Appeals rejected this analysis and looked instead to the fundamental elements of a hostile environment claim, which require that the plaintiff: (1) belong to a protected group; (2) be subjected to unwelcome sexual harassment; that is (3) based on the plaintiff’s sex; (4) affects a term or condition of employment; and

190. 90 F.3d 1372 (8th Cir. 1996).
191. *Id. at* 1374.
192. *See id.*
193. *See id.*
194. *Id.*
196. *Quick,* 90 F.3d at 1375-76.
197. *See id.*
(5) is or should be known of by the employer, who fails to take proper remedial action.198

Applying this test, the court found that the plaintiff was a member of a protected group because Title VII did not protect only women, but rather "bar[s] workplace sexual harassment against women because they are women and against men because they are men"199 and "prohibits disparate treatment of an individual, man or woman, based on that person's sex."200 The court found that there was a genuine issue of material fact as to whether the conduct constituted prohibited sexual harassment because "[i]ntimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. . . . [P]hysical aggression, violence, or verbal abuse may amount to sexual harassment."201 Turning to the question of whether the conduct occurred because of sex, the court found that the "[e]vidence that members of one sex were the primary targets of the harassment" was sufficient to support the inference that the conduct was based on the target's sex.202 The court thus reversed the trial court's entry of summary judgment and permitted the plaintiff to proceed to trial on the question of whether the conduct amounted to sexual harassment under the totality of the circumstances.203

Similarly, in Doe v. City of Belleville,204 the Seventh Circuit Court of Appeals confronted allegations that two sixteen-year-old twin brothers were subjected to a hostile work environment when their co-workers regularly taunted and threatened them with rape. One of the brothers, J. Doe, was overweight, and was nicknamed by his co-workers the "fat boy."205 H. Doe, the main target of the abuse, was called "fag" and "queer" because he wore an earring.206 One co-worker, Jeff Dawe, who was described as a "former marine of imposing stature," repeatedly called H. his "bitch" and threatened to take him "out to the woods" and "get [him] up the ass."207 Other co-workers, including the boys' supervisor, joined in the abuse, calling both boys names, encouraging Dawe to take H. out and "get a piece of that young ass," and speculating whether H. would be "tight or loose" and whether he "would scream or what?"208 The abuse escalated from the verbal to the physical when Dawe, proclaiming, "I'm going to finally find out if you are a girl or a guy," proceeded to back H. against a wall and grab his testicles.209

The court found this evidence sufficient to support the inference that "the workplace was made hostile" to H. Doe "because of his sex."210 As the court

198. See id. at 1377.
199. Id.
200. Id. at 1378.
201. Id. at 1379.
202. Id. at 1378.
203. See id. at 1379.
204. 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998).
205. Id. at 566.
206. Id.
207. Id. at 567.
208. Id.
209. Id.
210. Id. at 569.
explained, the constant prospect of “having his gender questioned” through
invasions designed to test whether he was actually “a girl,” combined with the
actual physical invasion of having his testicles grabbed and the threatened acts
of forcible anal sex created an atmosphere of sex-based hostility.211 Recognizing
the parallels between this conduct and the forms of gender stereotyping and sexual domination frequently directed at women, the court
found that:

[i]f H. were a woman, no court would have any difficulty construing
such abusive conduct as sexual harassment. And if the harassment were
triggered by that woman’s decision to wear overalls and a flannel shirt
to work, for example—something her harassers might perceive to be
masculine just as they apparently perceived H.’s decision to wear an
earring to be feminine—the court would have all the confirmation that it
needed that the harassment indeed amounted to discrimination on the
basis of sex.212

Continuing its examination of the role of gender stereotypes, the court
stated:

[A] man who is harassed because his voice is soft, his physique is slight,
his hair is long, or because in some other respect he exhibits his
masculinity in a way that does not meet his coworkers’ idea of how men
are to appear and behave, is harassed “because of” his sex.213

Thus, the court held the sex-based nature of the harassment could be
inferred, if not because of “the sexual character of the harassment itself,” then
because of “the harassers’ evident belief that in wearing an earring, H. Doe did
not conform to male standards.”214 Turning from the issue of gender stereotypes
to the issue of the significance of sexually explicit conduct, the court rejected
the analysis set forth in McWilliams.215 As the court explained:

We doubt that it would have mattered for H. Doe to know, when his
testicles were in Dawe’s grasp, that Dawe was heterosexual or (as his
deposition reveals) that he lived with a woman, and thus that he may not
have been sexually interested in H. The experience was still humiliating
in a deeply personal way, as only sexual acts can be.216

211. Id. at 568-69. The court compared the attempt to test whether H. was male or female to the conduct in
Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 902 (11th Cir. 1988), in which the harassers taunted a
woman who wore pants rather than skirts that they were going “to take your clothes off to see if you are real.”
Doe, 119 F.3d at 569 n.2.
212. Doe, 119 F.3d at 568.
213. Id. at 581;
214. See id. at 575.
215. See id. at 583-90 (discussing McWilliams and rejecting the “fundamental misconception that sexual
harassment inevitably is a matter of sexual desire run amok”).
216. Id. at 580.
In an analysis similar to that implicit in the opposite-sex jurisprudence, the court thus recognized that sexual conduct need not be based on sexual desire to be based on the plaintiff's sex. Moreover, continuing its examination of the significance of the sexual threats and acts directed at H., the court stated that "in view of the overt references to H.'s gender and the repeated allusions to sexual assault, it would appear unnecessary to require any further proof that H.'s gender had something to do with his harassment; the acts speak for themselves in that regard." In the court's view, the sexual nature of the conduct was sufficient to provide the requisite nexus to the plaintiff's gender because, as many courts had recognized in the context of harassment directed at women, conduct that reduces the target to a "sexual object," renders the work environment hostile in a way that is "inescapably and irrevocably linked to her gender." The court emphasized that "[f]rankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender," making it difficult to imagine circumstances in which "harassment of this kind would not be, in some measure, 'because of the harasser's sex.'"

Having expressed these views as to the significance of sexual conduct, the court acknowledged that some courts had found that "the explicitly sexual nature of the harassment is not enough to establish" that the harassment occurred because of the plaintiff's sex within the meaning of Title VII. The court, however, found it unnecessary, in light of the other evidence of the gender-based nature of the conduct before it, to decide whether the sexual aspects of the harassment were sufficient to support a finding of sex-based causation. As the court explained,

\[\text{[a]assuming arguendo that proof other than the explicit sexual character of the harassment is indeed necessary to establish that same-sex harassment qualifies as sex discrimination, the fact that H. Doe apparently was singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworker's view of appropriate masculine behavior supplies that proof here.}\]

Analogizing the gender stereotyping enforced upon H. to that enforced upon the female plaintiff in Hopkins who was told to walk, talk, and dress "more femininely," the court found that the evidence of the harassers' deriding H. as a

---

217. See supra Part I.B-C. (analyzing opposite-sex harassment cases that recognize the sex-based and sex-discriminatory nature of conduct that is not based on sexual desire, but rather arises from gender-based hostilities, enforcement of gender stereotypes, or exploitation of gender-based sexual vulnerabilities).
218. Doe, 119 F.3d at 577.
219. Id. at 579 (citations omitted).
220. Id. at 580.
221. Id. at 577.
222. Id. at 580.
“girl” and a “bitch” for wearing an earring provided “the link to the plaintiff’s sex that Title VII requires.”

Thus, in contrast to *McWilliams*, which treated the plaintiff’s individual attributes as factors distinct from and unrelated to the plaintiff’s sex, *Doe* examined the significance of these attributes in light of the plaintiff’s sex. In a manner similar to the opposite-sex harassment cases, the *Doe* court recognized that these attributes, although distinct from the plaintiff’s biological sex, became a basis for hostility and harassment only because of the gender-based norms imposed on the plaintiff as a result of his male sex. Moreover, contrary to *McWilliams*’ assumption that sexual conduct was irrelevant in the absence of sexual desire, the *Doe* court recognized the power of sexually explicit epithets, threats, and acts to intimidate and subordinate the target in a manner so intertwined with gender that it was clearly calculated to “humiliate him as a man,” and thus was causally related to the plaintiff’s sex within the meaning of Title VII.

The *Doe* court is not the only court that has recognized the potentially sex-based nature of male-on-male sexual harassment calculated to diminish the target’s status as a man by maligning his masculinity, demonstrating his vulnerability to sexual domination, and otherwise humiliating him through invocations of his gender-related traits. In *Sardinia v. Dellwood Foods, Inc.*, the court addressed allegations that the male plaintiff’s male supervisors persistently harassed him by repeatedly grabbing his genitals and buttocks while calling him “babe” or “faggot,” telling him he had a “nice ass,” informing him that one supervisor wanted to perform anal intercourse on him, and taunting him about the size of his penis. The court rejected the defendant’s claim that, because this conduct was perpetrated by males, it could not have been directed at the target because of his sex. As the court observed, individuals may harass members of their own biological sex for an array of reasons that are related to the target’s sex; “[t]here may or may not be homosexual aspects to such harassment. There may or may not be hatred of one’s own gender.” The court thus found that the gendered epithets, threats of sexual domination, and derision of the plaintiff’s masculinity directed at his sex-based physical attributes would permit a reasonable trier of fact to infer that the harassment had occurred because of the plaintiff’s sex.

In stark contrast to cases that categorically preclude claims for same-sex harassment, cases that preclude such claims absent proof of an anti-male environment, and cases that preclude such claims absent a showing of

223. Id. at 580-81 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989)).
224. Id. at 580.
226. Id. at *1.
227. See id. at *4-6.
228. Id. at *6 (citation and internal quotations omitted).
229. See supra Part II.A.1.
230. See supra Part II.A.2.
homosexual attraction,\textsuperscript{231} cases such as Doe and Sardina have recognized that conduct that invokes and enforces gender stereotypes and humiliates, intimidates, and demeans the target through scenarios of sexual objectification, exploitation, and domination can constitute discrimination based on sex.\textsuperscript{232} The Doe and Sardina courts have thus implicitly acknowledged the potentially sex-based nature of these types of conduct in much the same manner as comparable opposite-sex cases have.\textsuperscript{233} The following discussion elaborates upon the common sex-based and sex-discriminatory nature of these forms of gender-based derision, gender stereotyping, and sexually subordinating conduct in both opposite-sex and same-sex harassment cases.\textsuperscript{234}

B. The Common Sex-Based and Sex-Discriminatory Nature of Opposite-Sex and Same-Sex Harassment

This part examines the numerous parallels between the forms of harassment directed at women in the workplace and those directed at men. Upon examination of the conduct at issue in each type of case, it becomes apparent that opposite-sex and same-sex harassment both frequently serve to devalue femininity, discipline divergence from prescribed gender roles, and assert the dominance of the masculine over the feminine through scenarios of sexual objectification, domination, and abuse. Thus, it is argued in this part, same-sex and opposite-sex sexual harassment play virtually identical roles in subordinating certain individuals based on their gender-related traits, and in establishing and maintaining the workplace gender hierarchies that allocate power and privilege on the basis of masculinity.

1. Devaluing Femininity and Disciplining Divergence: The Invocation and Enforcement of Gender Stereotypes

One recurring pattern in both opposite-sex and same-sex harassment cases is the derision of stereotypically feminine traits and the marginalization of individuals who possess such traits. This form of harassment invokes gender

\textsuperscript{231} See supra Part II.A.3.

\textsuperscript{232} Other cases have also adopted a broad conception of sex-based causation that is capable of encompassing the range of sex-based conduct deemed actionable in the opposite-sex context. See, e.g., Miller v. Vesta, Inc., 946 F. Supp. 697, 704-06 (E.D. Wis. 1996) (emphasizing that the Supreme Court "has interpreted the term 'sex' expansively," and rejecting Goluszek's requirement that the workplace be biased against all members of the plaintiff's biological sex, as well as McWilliams' focus on sexual orientation, on the grounds that Title VII "protects all employees from all sexual harassment on account of their sex"); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354-55 (D. Nev. 1996) (holding that harassment based on individual's sex is actionable regardless of sexual attraction and regardless of whether hostility is directed toward all members of the plaintiff's biological sex); Ladd v. Seratoma Handicapped Opportunity Program, Inc., 917 F. Supp. 766, 767 (N.D. Okla. 1995) (holding that "the plain language of Title VII dictates the inclusion of all harassment in which the victim's sex is a factor"); Zalewski v. Overlook Hosp., 692 A.2d 131, 133-36 (N.J. Super. Ct. Law Div. 1996) (interpreting state law based on Title VII principles and holding that male-on-male sexual harassment based on gender stereotypes is actionable sex-based discrimination).

\textsuperscript{233} See supra Part I.B-C. (discussing opposite-sex cases recognizing sex-based nature of such conduct).

\textsuperscript{234} See infra Part II.B.
stereotypes that view stereotypically masculine traits as hallmarks of a competent, successful worker and depict stereotypically feminine traits as more appropriate to other, traditionally female roles centered around domesticity, sexuality, and reproduction.\(^{235}\) In the context of harassment directed at women, this conduct often takes the form of epithets and comments implying that women are not welcome in the workplace and continue to be perceived as domestic or sexual beings rather than as competent workers.\(^{236}\)

In the context of harassment directed at men, the harassment often involves words or actions that feminize the male target and associate him with devalued images of femaleness and femininity. In *Martin v. Norfolk Southern Railway*,\(^{237}\) for instance, the harassers depicted their target in feminizing terms by describing him as “cute” and “pretty” and by draping a piece of computer paper around his head as if it were a scarf.\(^{238}\) By doing so, they endowed him with feminine qualities that have been viewed as inconsistent with successful performance in male-dominated occupations.\(^{239}\) Similarly, in *Doe v. City of Belleville*,\(^{240}\) the harassers feminized the male target by explicitly questioning

---

235. See Abrams, supra note 101, at 2528-30 (discussing “devaluation” of women through “devalutative imagery” based upon stereotypes of females as, *inter alia*, “overly emotional or irrational, as vessels for the bearing of the next generation, [and] as moral mothers, unfit to withstand the insults of an ugly public world”); id. at 2533 (observing that women are “sometimes stigmatized on the basis of their sex—that is, simply because they are not men—but they may also be stigmatized for manifesting characteristics that are socially female”); Schultz, supra note 36, at 1754-63 (analyzing phenomenon whereby men create and maintain associations between masculine traits and images of institutional competence while depicting women and the qualities associated with them as ill-suited to success in the workplace); see also ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977) (describing conduct in which men seek to underscore gender differences as a means of setting women apart in order to perpetuate males’ privileged status in the workplace); *supra* notes 35-73 and accompanying text (discussing stereotypes of women as weak, vulnerable, essentially maternal beings and the role of these stereotypes in harassment directed at women).

236. See, e.g., Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 998-99 (10th Cir. 1996) (plaintiff, only woman on sales force, told that women had “no place” there); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1318 (8th Cir. 1994) (woman told she was unfit for the job because she was a woman); Sassaman v. Heart City Toyota, 879 F. Supp. 909 (N.D. Ind. 1994) (plaintiff admonished that she should be at home with children); Sones Morgan v. Hertz Corp., 542 F. Supp. 123, 126 (W.D. Tenn. 1981) (woman told her proper place was in the kitchen), *aff’d sub nom. Sones-Morgan v. Hertz Corp.*, 725 F.2d 1060 (6th Cir. 1984); *see also* Franke, *supra* note 11, at 709 (describing forms of harassment “indicating that women shouldn’t perform certain kinds of work, that a woman’s place [is] in the bedroom or the kitchen, [and] that hiring women was undesirable because they would quit and get married [or because] they were taking jobs from men with families”) (citations and internal quotations omitted); Schultz, *supra* note 36, at 1754 (discussing harassment that forces “women to perform stereotypically female tasks” based on “gendered expectations of what types of work are suitable for women to perform”); *id.* at 1760 (analyzing the significance of harassment that “exaggerates gender differences to remind [women] that they are out of place in a man’s world”).

In addition to these incidents of harassers’ informing women of their unwelcomeness in the workplace and of the continued perception of them as domestic beings, many forms of harassment employ epithets that graphically define women in terms of their female sexuality, often through derogatory images of sexual subordination to males. See, e.g., *Winsor*, 79 F.3d at 1000 (plaintiff described as “floor whore,” “curb whore,” and “fucking tramp”); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1507-08 (9th Cir. 1989) (female employees called “whores”); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 902 (11th Cir. 1988) (same); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1197 (N.D. Iowa 1996) (plaintiff called “bitch,” “skank,” and “dumb cunt”); *see also* EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35 (W.D.N.Y. 1994) (recognizing gender-specific, derogatory, and offensive connotations of terms such as “whore”).


238. *Id.* at 1047.

239. See, e.g., *Saum v. Widnall*, 912 F. Supp. 1384, 1388 (D. Colo. 1996) (recounting harassment in which female Air Force cadet was described as “too feminine” and “too pretty” to be a successful officer).

whether he was a “girl” and by describing him with the gender-specific epithet “bitch,” a term that invokes negative stereotypes associated with women. These male plaintiffs, like many female targets of sexual harassment, were ridiculed and demeaned for possessing traits perceived as feminine that have been traditionally disparaged in the workplace. In this way, same-sex harassment also serves to demean and marginalize certain individuals on the basis of their traditionally devalued feminine traits, thereby perpetuating the “sexual hierarchy in which women are regarded as inferior to men, and femininity is regarded as inferior to masculinity” in the workplace.

A distinct, but related, pattern that pervades both opposite-sex and same-sex harassment manifests itself through the invocation of gender-based stereotypes to penalize those who diverge from prescribed gender roles. Whether directed at women or at men, this gender-regulating form of harassment serves to perpetuate patterns of male domination and gender-based exclusion in the workplace by ensuring that women conform to stereotypical images of “who and what type[s] of workers women are supposed to be” instead of encroaching on traditionally male domain, while ensuring that men “project the desired manliness” necessary to preserve the “masculinized image” of certain types of work rather than blurring workplace gender boundaries. Thus, this form of harassment, in both the opposite-sex and the same-sex context, “perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.”


242. Notably, in some same-sex sexual harassment cases, the record is silent as to the plaintiff’s projected and perceived gender attributes, making it difficult to discern whether the demeaning and sexually invasive conduct was motivated by the target’s gender non-conformity. See, e.g., Quick v. Donaldson, 90 F.3d 1372 (8th Cir. 1996) (recognizing, in a case where record was silent as to the plaintiff’s appearance and demeanor, the possibility of sex-based harassment where harassers repeatedly grabbed target’s testicles and addressed him with homosexual epithets although there was no indication that he was homosexual); Oncale v. Sundowner Offshore Servs., 83 F.3d 118 (5th Cir. 1996) (finding no actionable sexual harassment between males as a matter of law without discussing relative gender identities of harassers and target), rev’d, 118 S. Ct. 998 (1998); Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994) (same). The failure of litigants and courts to develop this critical aspect of some same-sex sexual harassment cases may result in part from the courts’ previous failure to acknowledge the legal significance of gender distinctions between males, and may contribute to obscuring gender-driven dynamics in the future. For a further discussion of this issue, see infra note 391 and accompanying text.

243. Franke, supra note 11, at 762 (citing Case, supra note 6, at 2-3); accord Abrams, supra note 101, at 2516 (describing harassment of men who “abandon[ ] the qualities associated with men for the more socially stigmatized characteristics associated with women”).

244. Gender stereotyping has been defined as the assignment of certain behavioral traits as appropriate for one sex but not for the other. See Case, supra note 6, at 58-59.

245. Schultz, supra note 36, at 1754 (internal quotations omitted).

246. Id. at 1775 (explaining that “men have a lot at stake in assuring a tight linkage between their work and their masculinity. It is crucial for many men to maintain control over the masculinized image of their work. If a job is to confer masculinity, it must be held by those who project the desired manliness.”); see also id. at 1775 n.472 (discussing ways in which men create and perpetuate idealized masculine images of their work).

247. Franke, supra note 11, at 696. For a discussion of gender-regulatory harassment directed at women, see supra Part I.B.2.
Often, these gender-regulatory forms of harassment focus on castigating those who fail to adhere to gender-defined standards of appropriately feminine or appropriately masculine appearance and demeanor. While women are often maligned for exhibiting stereotypically male attributes, such as aggressiveness and physical prowess, and penalized for failing to exhibit traditionally devalued, stereotypically feminine traits, men are often denigrated for exuding a stereotypically feminine appearance or for projecting stereotypically feminine traits such as shyness and passivity. In both opposite-sex and same-sex cases of this nature, harassers sometimes explicitly question the target’s sex, thereby expressing their disdain for persons who diverge from appropriate standards of masculinity or femininity. Thus, both male and female targets are ostracized and ridiculed by harassers who object to their failure to conform, in appearance and demeanor, to prescribed gender roles.

In a particularly pernicious form of this gender-regulatory harassment, male targets are harassed for failing to conform to gender-stereotyped images of appropriate masculine sexual expression. This type of harassment invokes sexist and heterosexist stereotypes of males as active, assertive sexual aggressors who initiate and control sexual interactions with females, and of

248. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plaintiff evaluated unfavorably for possessing traits such as aggressiveness that would have been valued if exhibited by a man in a highly competitive accounting firm environment); Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226, 1236-37 (N.D. Ill. 1995) (plaintiff harassed for failing to conform to stereotypical notions of appropriate appearance and demeanor through repeated admonitions to act more femininely, look sexier and less matronly, wear shorter skirts and dresses, and show more emotion); Danna v. New York Tel. Co., 752 F. Supp. 594, 598 (S.D. Fla. 1989) (plaintiff told her co-workers would be more cooperative if she acted “more feminine and cute”); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 978 (S.D. Fla. 1989) (female police officer tormented with numerous hostile, offensive comments and acts based on her “involvement in bodybuilding and her concurrent use of steroids” that would have been encouraged in a male in the context of a law enforcement occupation requiring physical strength).


250. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996) (attributing harassment to the target’s “prudery, or shyness”); see also Abrams, supra note 101, at 2533 (discussing instances of harassment in which men are “stigmatized if they combine biological masculinity with socially female characteristics, such as emotionalism or sensitivity to sexual conduct”).

251. Compare Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 902 (11th Cir. 1988) (analyzing incident in which harassers threatened the female target, who wore pants rather than a skirt, that they were going to “take your pants off and put a skirt on you” and “take your clothes off to see if you are real”) with Doe, 119 F.3d at 567 (describing incident in which harasser grabbed target’s testicles in professed attempt to “finally find out” whether target, who wore an earring, was “a girl or a guy”).

252. See Franke, supra note 11, at 696 (arguing that harassment is “used to keep gender nonconformists in line”); Schultz, supra note 36, at 1801 (noting that men are frequently targeted for harassment that focuses on “denigrating [their] manhood” when “something about them threatened the dominant workers’ views about the suitable masculine image for those who hold the job”).

253. See Franke, supra note 11, at 758 (discussing patterns in which men who do not conform to stereotypes of appropriate sexual comportment are disciplined for their gender nonconformity); Schultz, supra note 36, at 1777, 1779 (analyzing harassment of men who are perceived as insufficiently “sexually robust” to satisfy stereotypes of masculine sexuality).
females as passive, submissive sexual objects. Based on these stereotypes, men who fail to fulfill expectations of male sexual prowess and conquest are targeted for humiliation and ridicule centered on the perceived inadequacies in their male sexual expression and conduct. For instance, in McWilliams, the harassers taunted the target that the only woman he could “get” would be a woman who was “deaf, dumb, and blind.” In Goluszek, the harassers similarly chided the target, who “blushed easily” and was “abnormally sensitive to comments pertaining to sex,” interrogating him in graphically sexual terms as to whether he had “gotten any pussy or had oral sex,” and admonishing him to “get some of that soft pink smelly stuff that’s between the legs of a woman.” And similarly, in Zalewski v. Overlook Hospital, the plaintiff was taunted based on his perceived sexual inexperience by harassers who, believing him “to be a virgin,” called him “whack’o” and “jerk-off,” insinuating that he masturbated instead of having sex with a woman. The harassers also placed in his desk and locker a picture of a kitten captioned “the only pussy Bill has even gotten” and a drawing depicting him viewing pornography for the first time and exclaiming “Wow! Is that what it looks like?”

Notably, the derision directed at these males who project an insufficiently masculine sexuality frequently includes epithets or comments insinuating that

---

254. See Hite, supra note 103, at 92 (arguing that society glorifies the male “sex drive,” defines the “...normal male as one who is ‘hungry’ for intercourse,” defines “female sexuality as ‘passive and receptive,’” and tells women to submit to the “aggressive male ‘sex drive’”); Naomi Wolf, Promiscuities: The Secret Struggle for Womanhood 14, 26-27 (1997) (explaining that for girls “being sexual meant being immobile,” “being sexy meant waiting and not doing, being watched rather than watching,” and that they “must not seek and initiate but must wait and yield”); Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 198 (discussing association between male power and male sexual assertiveness and observing that even in ancient Greece, where homosexuality was widely tolerated, the “passive” role was appropriate only for “boys, women, and slaves”—in other words, for those people excluded from the political process—while the active sexual role was associated with empowered adult men).

255. See Franke, supra note 11, at 758 (arguing that such harassment directed at men who do not project stereotypically heterosexual, masculine sexuality serves “as a way of policing masculinity,” and as a form of “gender discipline designed to punish them for their failure to live up to a hetero-masculine norm”); Schultz, supra note 36, at 1777, 1779 (discussing harassment that includes “attacks on [the] sexual virility” of men who are not sufficiently “sexually robust” to satisfy dominant notions of masculine sexuality).

256. 72 F.3d 1191 (4th Cir. 1996).

257. Id. at 1193.


261. Id. at 131.

262. Id.
the target is homosexual. Many courts, citing the principle that Title VII does not proscribe discrimination based on sexual orientation, have interpreted these homosexuality-based epithets as instances of sexual orientation bias that fall outside the ambit of statutory protection. However, the nature and circumstances of the harassment frequently belie this interpretation. In most instances, the targets were, in fact, believed to be heterosexual, but were maligned with homosexual epithets and insinuations for exhibiting inadequately masculine sexual prowess in the pursuit and conquest of women. Just as men who transgress gender norms by exhibiting insufficient masculinity are maligned as gay, so women who challenge gender boundaries by entering traditionally male occupations “are often branded as lesbians, without regard to the accuracy of the label.” This labeling is often an expression of hostility that is prompted by the target’s failure to adhere to stereotypical images of

263. See, e.g., Doe v. City of Belleville, 119 F.3d 563, 566 (7th Cir. 1997) (plaintiff called “fag” and “queer”), vacated and remanded, 118 S. Ct. 1183 (1998); Quick v. Donaldson Co., 90 F.3d 1372, 1375 (8th Cir. 1996) (harassers described the plaintiff as a “Pocket Lizard Licker,” labeled him “Gay and Proud,” and wrote the word “queer” on his work identification card); Gerd v. United Parcel Serv., Inc., 934 F. Supp. 357, 358 (D. Colo. 1996) (harasser taunted target with references to “all [his] boyfriends”); Ashworth v. Roundup Co., 897 F. Supp. 489, 490 (W.D. Wash. 1995) (supervisor called plaintiff “homo” and “faggot”); Vandeventer v. Wabash Nat’l Corp., 867 F. Supp. 790, 796 (N.D. Ind. 1994) (crew leader called plaintiff “dick sucker,” told plaintiff to “drop down,” and asked plaintiff if he could perform fellatio without his false teeth); Dillon v. Frank, No. 90-CV-70799-DT, 1990 U.S. Dist. LEXIS 20096, at *1 (E.D. Mich. Oct. 16, 1990) (plaintiff harassed because co-workers thought he was homosexual). In more unusual circumstances, women have invoked these gender stereotypes in a similar manner, directing homophobic epithets at males whom they perceive as insufficiently masculine. See, e.g., Provencher v. CVS Pharmacy, 145 F.3d 5, 13 (1st Cir. 1998) (female manager suggested that plaintiff receive counseling for his homosexuality, called him “fag” and “queer,” and said she would make him a “real man”).

264. See, e.g., DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (holding that discrimination because of effeminacy or homosexuality does not fall within the purview of Title VII); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that Title VII’s prohibition of “sex” discrimination should not be judicially extended to include discrimination because of sexual preference); Mayo v. Kiwest Corp., 898 F. Supp. 335, 337 n.1 (E.D. Va. 1995) (holding that discrimination “because of sexual preference . . . is afforded no protection by the very words of Title VII”), aff’d 94 F.3d 641 (4th Cir. 1996); Dillon, 1990 U.S. Dist. LEXIS 20096, at *16 (holding that Title VII’s prohibition against “sex” discrimination does not encompass discrimination based on sexual preference).

265. See, e.g., Doe, 119 F.3d at 566 (plaintiff, who was not believed to be gay but who wore an earring, was called “gay” and “queer”); Quick, 90 F.3d at 1375 (harassers described plaintiff as “Pocket Lizard Licker,” attached label to him that read “Gay and Proud” and Inscribed the word “queer” on his work identification card, although there was no basis for believing he was homosexual); Gerd, 934 F. Supp. at 358 (target taunted about his “boyfriends” although harasser had no basis for believing he was gay); Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1047 (N.D. Ala. 1996) (recounting, in a case where there was “no evidence” that the plaintiff was homosexual, insults describing the plaintiff’s girlfriend as “ugly,” questioning where he “was getting his [sex],” and describing plaintiff as one of the “Three Musquequeers”).

Even where a target is believed to be homosexual, the presence of anti-gay epithets does not preclude a finding that the plaintiff was subjected to gender-based harassment based on perceived inadequacies in his masculinity. See Schultz, supra note 36, at 1786 (analyzing opinion in Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992) and criticizing its characterization of the harassment, which included anti-gay epithets, as strictly based on sexual orientation, contrary to plaintiff’s contentions that the harassment was based on “[sex] stereotyping, in that he was not deemed ‘macho’ enough by his co-workers for a man’); see also id. at 1777 (“Simply because . . . harassment may include some antigay expression . . . does not mean that it is not based on gender.”); Pascal Mallet, et al., The Development of Gender Schemata About Heterosexual and Homosexual Others During Adolescence, 124 J. GEN. PSYCHOL. 91, 91, 93 (1997) (noting that many homosexual men possess more characteristics typically associated with women and thus project a more feminine gender identity than do most heterosexual men).

266. Schultz, supra note 36, at 1775 & n.73 (discussing examples of such conduct directed toward female police officers and firefighters) (citations omitted).
appropriately feminine endeavors and not by any aspect of her sexual
preferences or proclivities.\textsuperscript{267}

Thus, the homosexuality-centered epithets and insinuations that pervade so
many same-sex sexual harassment cases do not reflect animus toward
homosexuals \textit{per se}, but rather reflect the harasser’s aversion to males who fail
to conform to idealized notions of masculinity and male sexuality, and who
thereby disrupt the uniformity of the masculine image that the harassers seek to
associate with their occupation.\textsuperscript{268} These epithets serve to marginalize and
stigmatize the target by maligning his adequacy as a man according to gender-
stereotyped notions of masculine sexuality.\textsuperscript{269} In this manner, the harassment
functions “as a medium through which some men seek to defend their view of
masculine interests and identity against contesting visions proposed by other
men.”\textsuperscript{270} Accordingly, these derisions of the target’s sexuality are most
accurately understood as yet another means of enforcing gender stereotypes in
the workplace by punishing individuals—whether male or female—who
deviate from established gender norms.\textsuperscript{271}

2. \textit{Scenarios of Sexual Objectification, Domination, and Abuse:
Sexualized Conduct and the Assertion of Gender Dominance}

In addition to harassment that invokes gender stereotypes to demean and
marginalize male and female targets alike for projecting devalued traits and for
deviating from gender norms, a separate category of harassment involves
unwelcome, sexually explicit conduct between the harasser and the target. Such
overly sexual forms of harassment draw upon stereotypes of masculine sexual
aggression and domination and of feminine sexual passivity and submission, to
exercise and demonstrate the harasser’s power over the target in sex-based
terms. This harassment vividly portrays the harasser as a masculinized,

\textsuperscript{267} Id.

\textsuperscript{268} See Abrams, supra note 101, at 2512 (contending that certain men are targeted because they “fit
uneasily within established gender categories, by virtue of their aversion to sexualized talk or conduct in the
workplace”).

\textsuperscript{269} These epithets also stigmatize the target by identifying him with an historically subordinated,
persecuted, and marginalized minority, thus depriving him of the privileged status reserved for appropriately
masculine, sexually assertive males. For an excellent discussion of the powerlessness and isolation traditionally
associated with homosexual identity, see Kenji Yoshino, \textit{Suspect Symbols: The Literary Argument for Heightened

Some commentators have argued that gender identity and sexual orientation are so inextricably intertwined
that discrimination based on sexual orientation must be construed as a form of discrimination based on gender. \textit{See}
Judith Lorber, \textit{Paradoxes of Gender} 55-79 (1994); \textit{see also} Brief Amicus Curiae of the Nat’l Org. on Male
998 (1997) (No. 96-568, 1997 WL 471814) (asserting that “[t]he gender of a person with whom one has sex, or is
thought to have sex, is a powerful constituent of whether one is considered a man or a woman in society” and thus
should be recognized as an aspect of an individual’s sex). However, in many cases of same-sex harassment,
especially where there is no basis for believing that the target is in fact homosexual, the homophobic epithets and
insinuations are more accurately viewed as a form of gender discrimination that does not implicate the issue of
discrimination based on homosexuality.

\textsuperscript{270} Schultz, supra note 36, at 1755 n.387.

\textsuperscript{271} Cf. supra Part I.B.2; supra notes 244-262 and accompanying text (discussing other forms of conduct
intended to penalize divergence from prescribed gender roles).
dominant sexual aggressor while portraying the target as a feminized, subordinate sexual object, thereby perpetuating workplace gender hierarchies that equate masculinity with power and femininity with powerlessness and that consign less masculine individuals to positions of inferiority.272

Regardless of whether these sexual humiliations and invasions are directed at women or at men whose projected gender identity is perceived as less masculine than the harasser’s, these forms of sexual domination vividly evoke the harasser’s uniquely male biological capacity to penetrate and dominate sexually. Thus, these forms of harassment become a powerful means by which dominant, masculine males communicate their superior position in terms of a gender-based hierarchy, perpetuate the masculinized image of power, and marginalize and subordinate women and men who occupy lower strata on the gender-driven hierarchy of power and privilege in the workplace.273

In both the opposite-sex context and the same-sex context, harassers employ a broad range of verbal and physical sexual conduct to exert their power over the target in profoundly gender-laden terms.274 Although the precise nature of the sexual conduct varies widely, such conduct consistently demonstrates the harasser’s sexual power to objectify, dominate, and humiliate the target, reducing his or her status to that of the stereotypically feminine role of a sexual object whose sexuality is at the harasser’s disposal.275

---

272. See Catherine A. MacKinnon, Toward a Feminist Theory of the State 114, 127 (1989). As MacKinnon explains, “[M]ale dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy. . . . The male sexual role . . . centers on aggressive intrusion on those with less power.” Id. (footnotes omitted); Franke, supra note 11, at 745 (describing offensive workplace sexual conduct as “the expression, in sexual terms, of power, privilege, and dominance”).

273. See Franke, supra note 11, at 762 (discussing the body of scholarship documenting ways in which sexual domination creates “a gendered hierarchy based upon the enforced inferiority of women to men” by “reduc[ing] women to victimized, highly sexual, less competent sub-humans who do not enjoy full agency,” and arguing that these dynamics affect men as well as women through gendered patterns of subordination that define the identity and status of less masculine men); see also Abrams, supra note 101, at 2480 (arguing that certain forms of sexual conduct characterize women “primarily as sexual objects, or as objects of sex-based derision, rather than as competent workers,” causing women to “perceive sexualized conduct as more of a threat to their professional and personal security than would their male counterparts); id. at 2516-17 (suggesting that men who “manifest qualities socially designated as female” can be subjected to similar forms of devaluation and subordination).

274. See generally MacKinnon, supra note 74 (identifying sexual harassment as an exertion of power); Craig, supra note 11, at 110 (discussing consensus among courts that “the objective” of same-sex sexual harassment “is maintenance and abuse of power and dominance, rather than a real desire for sex”). For a discussion of gender-subordinating sexual conduct directed at women, see supra Part I.C.

275. See Craig, supra note 11, at 110. While the cases addressing same-sex harassment are replete with examples of these forms of sexually subordinating conduct, many cases have disposed of same-sex harassment claims based on a categorical rule precluding such claims altogether, or precluding them absent a showing of an anti-male environment or of a homosexual attraction. See supra Part II.A.1-3. Thus, the descriptions of the sexually subordinating conduct that are presented in the same-sex harassment jurisprudence may omit many significant aspects of the sexualized conduct and the surrounding gender-based power dynamics. Moreover, the Supreme Court, in describing the same-sex sexual abuse in Oncale, reduced a protracted pattern of violent, vivid imagery of anal penetration to several sentences in which the Court quickly summarized the facts “only generally,” in the “interests of both brevity and dignity.” Oncale, 118 S. Ct. at 1000; accord Schoiberg v. Emro Mktg. Co., 941 F. Supp. 730, 731 (N.D. Ill. 1996) (describing the conduct as “despicable and abhorrent” but providing only a “vague rendition of the relevant facts” in light of the court’s conclusion that same-sex harassment claims were barred as a matter of law). Despite these factors suggesting that the case law may not convey the precise nature or full severity of the types of sexually explicit conduct often directed at men, the numerous
In many instances, the harasser confronts the target with unwelcome, sexually suggestive objects and innuendoes depicting the target in a sexual light.\textsuperscript{276} Such conduct establishes the harasser's status as the sexual initiator, asserting his power to define the target in sexual terms, while simultaneously subordinating and humiliating the target by depriving the target of the power and autonomy to control expressions of his or her own sexuality.\textsuperscript{277}

\textsuperscript{276} Such conduct is often directed at women. See, e.g., Stair v. Lehigh Valley Carpenters Local Union No. 600, No. CIV.A. 91-1507, 1993 WL 235491, at *21 (E.D. Pa. July 24, 1993) (recounting pattern of conduct that revealed that harassers viewed targets as "sexual objects rather than as skilled co-workers"); Morris v. American Nat'l Can Corp., 730 F. Supp. 1489, 1491 (E.D. Mo. 1989) (describing pattern of harassment in which harassers continually made comments about plaintiff's sex life, references to her performing oral sex, and allusions to her "boobs" and "big butt," presented her with a picture of a nude woman touching her breasts, captioned "you should be doing this instead of a man's job," and confronted her with sexually suggestive objects including a sausage with a note "bite me baby," a clay replica of a penis, a stained sanitary napkin, and pornographic pictures), \textit{aff'd in part and rev'd in part on other grounds}, 952 F.2d 200 (8th Cir. 1991); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 977 (S.D. Fla. 1989) (female police officer subjected to kissing, moaning, singing, and other sexually suggestive noises over police radio, depicted in sexually offensive pictures and graffiti displayed around police department, and presented with "a soiled condom, a sanitary napkin, two vibrators, and a urinal device in her mailbox"); Berkman v. City of New York, 580 F. Supp. 226, 231 (E.D.N.Y. 1983) (noting that female firefighter had "prophylactic devices and a wet vibrator placed in her bed"), \textit{aff'd}, 755 F.2d 913 (2d Cir. 1985). Similar conduct is also directed at men. See Quick v. Donaldson Co., 90 F.3d 1372, 1374 (8th Cir. 1996) (harassers affixed tags to plaintiff's forklift and belt loop alluding to sexual acts with a cucumber and labelling him "Pocket Lizard Licker"); McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996) (harasser placed condom in target's food).

\textsuperscript{277} Notably, in the opposite-sex context, many courts have inferred the requisite sex-based causal nexus from the mere fact that the conduct is sexual, often with little analysis of how sexual conduct operates as a form of sex discrimination. See, e.g., Farabella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 n.2 (5th Cir. 1996) (finding that sexualized conduct directed at a woman was "unquestionably based on gender"); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996) (Niemeyer, J., concurring) ("[W]hen someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is "because of" the victim's gender."); Burns v. McGregor Elec. Indus., 989 F.2d 959, 964 (8th Cir. 1993) ("[S]exual behavior directed at a woman raises the inference that the harassment is based on her sex."); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (holding, in opposite-sex context, that "the intent to discriminate on the basis of sex in cases involving sexual propositions, suggestive, pornographic materials, or sexually-derogatory language is implicit and thus should be recognized as a matter of course"); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982) (inferring a hostile environment based on sex from "sex-based approbrium" and "constant lectures pertaining to her sex life" directed at female plaintiff); see also Doe v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1997) (collecting and discussing cases inferring sex-based causation based upon fact of sexual conduct directed at a female by a male), \textit{vacated and remanded}, 118 S. Ct. 1183 (1998). See generally Franke, supra note 11. However, these presumptions of sex-based causation in the opposite-sex context are frequently based on the premise that the harassment resulted from the harasser's presumed (hetero)sexual attraction to persons of the target's biological sex, when in reality the harassment more frequently reflects an expression of gender-based hostilities and an intent to enforce gender stereotypes of masculine domination and feminine subordination through sexual domination of females and less masculine males. See id. at 745.

In the words of Professor Katherine Franke:

it would be both a theoretical and a descriptive mistake to characterize offensive workplace conduct primarily as the expression of sexual desire. Rather, sexual harassment is best understood as the expression, in sexual terms, of power, privilege, and dominance. What makes it sex discrimination . . . is not the fact that the conduct is sexual, but that the sexual conduct is being used to enforce or perpetuate gender norms and stereotypes.

\textit{Id.} In emphasizing the common sex-based nature of opposite-sex and same-sex harassment, this Article does not intend to urge courts addressing same-sex harassment to replicate the conceptual flaws of the opposite-sex jurisprudence in order to reach the same results based on the same questionable theoretical grounds. To the contrary, this Article urges courts in both the same-sex and the opposite-sex sexual harassment contexts to refine their analyses of the forms of gender stereotyping and sexual subordination that are reflected and replicated so
In numerous cases, the harasser evokes vivid images of sexual interactions between himself and the target that cast the harasser in the stereotypically male role as the dominant sexual aggressor while casting the target in the stereotypically female role as a sexual object. Moreover, both opposite-sex and same-sex harassers often impose their sexuality upon the target by exposing or threatening to expose their genitals to the target, by forcing the target into unwelcome contact with the harasser's genitals, and by groping, grabbing, or fondling the target's sexually intimate anatomy in unwelcome affronts to the target's sexual dignity and autonomy that demonstrate the harasser's power to transgress the target's sexual boundaries at will.

powerfully by means of the sexual conduct, and to draw upon these analyses to recognize that the same gender-discriminatory dynamics frequently undergird unwelcome sexual conduct directed at women and unwelcome sexual conduct directed at men.

278. See, e.g., Rivera v. Prudential Ins. Co. of Am., 95-CV-0829, 1996 WL 637555 at *1-2 (S.D.N.Y. Oct. 21, 1996) (harasser gyrated groin against one female plaintiff's arm, made sexually suggestive noises toward her, grabbed another female plaintiff's buttocks, and told her how "horny" he was while grabbing his penis); Hernandez v. Wangen, 938 F. Supp. 1052, 1055-56 (D.P.R. 1996) (harasser grabbed plaintiff's buttocks and made sexually explicit comments while rubbing his hands up and down her neck at an office social gathering); EEOC Decision No. 84-1, 1983 WL 22487, at *1 (E.E.O.C. Nov. 28, 1983) (harasser made repeated gestures evocative of sexual invasions and rape and told plaintiff "keep bending and I'll drive you home"); EEOC Decision No. 81-18, 1981 EEOC LEXIS 14, at *14 (E.E.O.C. Apr. 3, 1981) (harasser gestured as if fondling plaintiff's breasts, stating his desire to "cop a feel," and told plaintiff she resembled a sheep and suggested that she was, therefore, likely to "get rammed").

Harassers have similarly directed such conduct at male targets. See, e.g., Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 732 (N.D. Ill. 1996) (harasser subjected target to "sexually explicit and degrading remarks"); Gerd v. United Parcel Serv., Inc., 934 F. Supp. 357, 359 (D. Colo. 1996) (harasser "rubbed his hands up and down" target's thighs while thrusting his pelvis in the target's direction); Mayo v. Kiwest Corp., 898 F. Supp. 335, 336 (E.D. Va. 1995) (harasser "made sexually explicit and vulgar comments to" plaintiff and "grabbed him in a sexual manner"); aff'd, 94 F. 3d 641 (4th Cir. 1996); Ashworth v. Roundup, 897 F. Supp. 489, 490 (W.D. Wash. 1995) (harasser told worker that he had to "form a picture of [the plaintiff] in [his] mind and he was going to go home and jack off"). In some instances, the harasser explicitly feminizes his male target, compounding the subordination implicit in his objectification of the target's sexuality. In one particularly striking example of sexualized conduct calculated to feminize as well as sexually objectify the target, one of the harassers who subjected the target to a campaign of sexual humiliation and abuse "flick[ed] his tongue" at the plaintiff while stating "I love you, I feel you," in a clear simulation of cummilingus that, biologically, can only be performed on a woman. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996). Because the harassers routinely sexually objectified women by displaying pornography and depictions of "scantily clad women" in the work area, see id. at 1193, this gesture both feminized and objectified the plaintiff, vividly demonstrating his position of subordination relative to his male co-workers.


281. This conduct is often perpetrated against women. See, e.g., Bonenberger v. Plymouth Township, 132 F.3d 20, 22 (3d Cir. 1997) (defendant grabbed plaintiff's breasts); Dombek v. Milwaukee Valve Co., 40 F.3d
These invasions are often accompanied by threats of more violent forms of sexual invasion and abuse that invoke images of forcible penetration of the target. In many cases, just as male harassers use the threat of rape and actual acts of sexual violence to intimidate and subordinate women in the workplace,282 so they invoke the quintessentially male imagery of forcible penetration through threats of rape and scenarios of simulated oral and anal sodomy in a manner that expressly depicts the harasser’s manhood and superior masculinity as the source of his power to dominate the target.283 Andrea


Men are also sometimes victimized by this conduct. See, e.g., Doe, 119 F.3d at 566 (describing incident in which the harasser backed target against a wall and grabbed his testicles in a pressured attempt to determine whether the target was male or female); Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1374-75 (9th Cir. 1996) (observing that co-workers grabbed and squeezed plaintiff’s testicles hard enough to produce bruising and swelling); McWilliams, 72 F.3d at 1193 (one of target’s harassers entered area where target was working and “fondled him”); Ward, 940 F. Supp. at 811 (noting that harasser “solicited genital contact” with target); Gibson v. Tanks, Inc., 930 F. Supp. 1107, 1108 (M.D.N.C. 1996) (harasser “poked and grabbed” plaintiff “in the buttocks and genital area”); Martin, 926 F. Supp. at 1046 (harassers “grabbed at and pinched [target] in and around his legs and posterior” and “grabbed at or swatted towards [plaintiff’s] genitals”); Ton v. Information Resources, Inc., No. 95C 3565, 1996 WL 5322, at *1 (N.D. Ill. Jan. 3, 1996) (manager repeatedly clutched plaintiff’s crotch and buttocks); Benekritis, 882 F. Supp. at 524 (co-worker placed hand on plaintiff’s genitals); Sardinia v. Dellwood Foods, Inc., No. 94 Civ. 5458 (LAP), 1995 WL 640502, at *1 (S.D.N.Y. Oct. 30, 1995) (harassers frequently grabbed plaintiff’s buttocks and genitals).

282. See, e.g., Bundy v. Jackson, 641 F.2d 934, 940 (D.C. Cir. 1981) (plaintiff’s supervisor, upon learning of pattern of offensive sexual propositions directed at plaintiff, told her “any man in his right mind would want to rape you”); DiLaurenzio, 926 F. Supp. at 312 (harasser stated he should “give [plaintiff] a good screw” before her wedding); Saum v. Widnall, 912 F. Supp. 1384, 1388-89 (D. Colo. 1996) (plaintiff forced to play “victim” in a simulated rape scenario, in the course of which fellow Air Force cadet made her kneel down, shoved his crotch in plaintiff’s face and inserted a stick in her pants); Berkman v. City of New York, 580 F. Supp. 226, 231 (E.D.N.Y. 1983) (recounting incidents of “extensive sexual abuse” and “physical sexual molestation” of plaintiff), aff’d, 755 F.2d 913 (2d Cir. 1985); EEOC Decision No. 84-1, 1983 WL 22487, at *1 (E.E.O.C. Nov. 28, 1983) (harasser made repeated gestures evocative of sexual invasions and rape, and told plaintiff “keep bending and I’ll drive you home”); EEOC Decision No. 81-18, 1981 EEOC LEXIS 14, at *14 (E.E.O.C. Apr. 3, 1981) (harasser told plaintiff she resembled a sheep and suggested that she was, therefore, likely to “get rammed”).

283. See, e.g., Oncle, 118 S. Ct. at 1001 (harassers repeatedly threatened plaintiff with rape, and penetrated his anus with a bar of soap while restraining and threatening to rape him); Johnson v. Hondo, Inc., 125 F.3d 408, 410 n.1 (7th Cir. 1997) (co-worker frequently told employee “I am going to make you suck my dick,” while gesturing as if masturbating and coming to within inches of the plaintiff’s face); Doe, 119 F.3d 567 (harasser told plaintiff that he was going to take him "out to the woods" and get him "up the ass," and speculated whether plaintiff was "tight or loose" and whether he would "scream" upon his doing so); McWilliams, 72 F.3d at 1193 (co-workers tied plaintiff’s hands together, blindfolded him, forced him to his knees, and perpetrated acts of simulated sodomy on him by inserting a finger in his mouth and putting a broomstick between his buttocks); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 448 (5th Cir. 1994) (supervisor approached plaintiff from behind, reached around and grabbed plaintiff’s crotch while making sexual motions from behind him); Bacon v. Art Inst. of Chicago, 6 F. Supp. 2d 762, 765 (N.D. Ill. 1998) (co-worker twice grabbed plaintiff from behind by his hips and feigned act of anal intercourse by proceeding to thrust his penis against plaintiff’s buttocks); Rasmussen v. Copeland Lumber Yards, Inc., 988 F. Supp. 1294, 1295-96 (D. Nev. 1997) (co-worker pulled employee’s head towards his crotch as employee was bending over to retrieve a toolbox, and in a separate incident restrained him and “started humping [him] like a dog”); Torres, 943 F. Supp. at 953 (harasser inserted finger into plaintiff’s rectum); Martin, 926 F. Supp. at 1047 (describing incident in which one harasser bent the plaintiff over a chair, while another harasser “attempted to stick a broom handle into his anus”); Messina v. Araserve, Inc., 906 F. Supp.
Dworkin, in her analysis of the gender dynamics underlying male sexual abuse of other males, has aptly explained that, “[t]he abomination is to do to men what is normally done to women in the fuck: the penetration; the possession; the contempt because she is less . . . the right to use her, which is, inevitably, a right over her.” Numerous other commentators have recognized that the sexual domination, intimidation, and abuse of men by other men reflects, exploits, and perpetuates deeply rooted patterns of gender inequality by asserting the dominance of the masculine over the feminine. Thus, just as opposite-sex sexual harassment disempowers and marginalizes women in the workplace by casting them in the inferior role of sexual subservience to male sexual aggressors, so same-sex sexual harassment replicates these powerfully gendered and gender-discriminatory dynamics between members of the male biological sex, establishing and enforcing the harasser’s and the target’s relative positions according to a gender-driven hierarchy.

These cases, in which harassers direct an array of unwelcome sexual acts at both female and male targets, reveal the common ways in which harassers in both same-sex and opposite-sex contexts employ sexual interactions to subordinate their targets in profoundly gender-laden terms that are inextricably intertwined with the harasser’s uniquely male capacity to dominate others through sexual penetration. When male harassers invoke this gendered form of domination over their targets to subordinate women and less masculine men, they forcefully assert forms of power that derive directly from their maleness and masculinity, thereby relegating less masculine individuals to positions of inferiority and perpetuating the associations between masculinity and power in the workplace.

The foregoing analysis demonstrates that same-sex harassment and opposite-sex harassment play strikingly similar roles in establishing and maintaining workplace gender hierarchies founded on the hegemony and dominance of the masculine over the feminine. In both contexts, harassers invoke gender-based stereotypes and employ humiliating, abusive sexual

---

34, 35 (D. Mass. 1995) (harasser grabbed plaintiff’s head and pulled it toward his crotch); Ashworth v. Roundup Co., 897 F. Supp. 489, 492-94 (W.D. Wash. 1995) (harasser, who threatened to “butt fuck” the plaintiff, “goosed” him by jabbing a steel object between his buttocks); Polly, 825 F. Supp. at 136 (harassers forced a broom handle against plaintiff’s rectum); Goluszek v. Smith, 697 F. Supp. 1452, 1454 (N.D. Ill. 1988) (harasser poked plaintiff in the buttocks with a stick); Sardinia, 1995 WL 640502, at *1 (supervisors would “frequently grab plaintiff’s genitals or his buttocks” and state that they wanted “to perform anal intercourse on him”); Fleenor. 1995 WL 386793, at *1 (harasser “threatened to force plaintiff to engage in oral sex and stuck a ruler up plaintiff’s buttocks without his consent”); Cummings v. Koehnen, 568 N.W.2d 418, 419-20 (Minn. 1997) (supervisor placed his hands on employee’s hips, simulating anal sex, while stating “[h]ere, let me show you how a real man takes it”).

284. DWORKIN, supra note 103, at 155; see also Koppelman, supra note 8, at 235 (“The central outrage of male sodomy is that a man is reduced to the status of a women, which is understood to be degrading.”).

285. See SCARCE, supra note 6, at 11-35; see also Case, supra note 6, at 7 (discussing harassment of less masculine males by more masculine males and characterizing such harassment as “a form of gender discrimination” perpetrated by “certain ‘active’ masculine males to drive out of the workplace those they see as contaminating it with the taint of feminine passivity”); Kramer, supra note 6, at 308 (describing the “feminization” of men who are forced into roles of sexual passivity, which results in their diminution to “the object of prejudice[s] . . . normally reserved . . . for women”); Levit, supra note 6, at 1068 (arguing that harassment and sexual abuse target and disempower “men who do not conform to conventional notions of maleness”).

286. See supra Part I.C (analyzing the gender-subordinating implications of sexually explicit conduct directed at women).
conduct to marginalize, intimidate, and subordinate individuals, both male and female, based on their gender-related traits and their degree of conformity to prescribed gender norms. It is important to emphasize that in the same-sex context as well as the opposite-sex context, these gender-subordinating acts generally do not occur as isolated incidents. Rather, they often form part of a concerted campaign of relentless torment and persecution that becomes the predominant, defining aspect of the target’s existence in the workplace, disrupting his ability to perform his work, supplanting any normal interactions with his peers, and in many cases forcing him from the job. Justice O’Connor has observed that “a discriminatorily abusive work environment . . . can and often will detract from [an] employee’s job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” In the context of the relentless and debilitating campaigns of abuse perpetrated against many same-sex sexual harassment plaintiffs, this observation becomes an understatement.

Significantly, in the same-sex context, the forms of gender-subordinating conduct discussed above highlight and exploit gender-based differences among men, demonstrating that the dominance of masculinity can be asserted to establish power relationships among males, much as it is frequently asserted to establish the power of males over females. Recognition of these sex-discriminatory dynamics that subordinate certain men to other men based on their sex- and gender-related traits clearly impugns the logic of cases holding that same-sex sexual harassment cannot, as a matter of law, be viewed as a form of sex discrimination. This recognition also calls into question the logic of cases recognizing the existence of sex-based discrimination only when the objectionable conduct reflects an antipathy or an attraction toward males as a biological sex. Each of these lines of cases implicitly views the notion of “sex” monolithically, obscuring gender-based patterns of subordination within the male biological sex, and consequently recognizing sex-based conduct only

287. See, e.g., Oncale, 118 S. Ct. at 1000-01 (plaintiff quit his job on an all-male oil rig crew following a series of repeated threats of rape culminating in an incident in which several coworkers, acting together, restrained him and inserted an object into his anus, convincing him that he would be raped if he did not leave his job); Doe, 119 F.3d at 566 (plaintiffs quit their jobs following campaign of gender-based epithets, threats of anal rape, and assault involving grabbing of the plaintiff’s testicles that convinced plaintiff that harasser was capable of carrying out his threats); McWilliams, 72 F.3d at 1194 (automotive mechanic developed “severe emotional problems” that required him to leave his job following a campaign of sexual epithets, insults, and threats culminating in incidents in which several coworkers participated in blindfolding and restraining him while others inserted a finger in his mouth and a broomstick between his buttocks); Quick, 90 F.3d at 1375 (plaintiff sought medical and psychological treatment following constant epithets, humiliating pranks, and “bagging” incidents involving grabbing of his testicles hard enough to produce bruising and swelling); Martin, 926 F. Supp. at 1048 (plaintiff left job on medical leave and never returned following constant gender-related insults, sexually invasive touching, and threats of anal rape culminating in incident in which one co-worker bent him over a chair while another attempted to penetrate his anus with a broom handle).


289. See Abrams, supra note 101, at 2516-17 (contending that “dynamics within a privileged group,” and “dynamics within [a] disadvantaged group” can be “marked by the same hierarchical inflections” that characterize “relations between privileged and non-privileged groups”) (citations omitted).

290. See supra Part II.A.1.

291. See supra Part II.A.2 (discussing cases requiring a showing of antipathy toward males in general); supra Part II.A.3 (examining cases requiring a homosexual attraction toward members of the male sex).
where it implicates all males uniformly as a biological sex. Accordingly, this recognition of the ways in which same-sex sexual harassment, like opposite-sex sexual harassment, perpetuates powerful sex-based and sex-discriminatory dynamics in the workplace exposes the conceptual flaws in the lower courts’ deeply divided same-sex sexual harassment jurisprudence. The following part examines the impact of the Supreme Court’s first pronouncement in this problematic and fragmented area of the law.

III. THE SIGNIFICANCE OF ONCALE: A PYRRHIC VICTORY FOR SAME-SEX SEXUAL HARASSMENT PLAINTIFFS?

Last year, the United States Supreme Court addressed the issue of same-sex sexual harassment for the first time in its unanimous opinion in Oncale v. Sundowner Offshore Services, Inc. This part examines the implications of Oncale and argues that, although its recognition of a cause of action for same-sex sexual harassment represents an important advance in the evolution of the same-sex sexual harassment jurisprudence, its dicta on the issue of sex-based causation fail to dispel some of the myths and misperceptions that pervade the lower courts’ pre-Oncale decisions. Because of its resounding silence on issues of sex and sex-based causation in the context of interactions among males, the opinion does little to enhance judicial understandings of these concepts as they apply to same-sex sexual harassment claims. The opinion thus fails to ensure that subsequent adjudications of same-sex sexual harassment issues will transcend the conceptual limitations that have characterized the prior jurisprudence, and poses the risk that the post-Oncale jurisprudence will replicate the pre-Oncale tendencies to rely on unduly constrained, monolithic conceptions of sex that disregard gender-based dynamics among biological males.

A. Addressing the “Bewildering” Divergence Among Lower Courts:
Recognizing the Cause of Action, Overruling the Categorical Preclusion, and Rejecting the Requirement of Homosexual Attraction

The Supreme Court’s holding in Oncale significantly advances the development of the legal doctrine governing same-sex sexual harassment claims, resolving many of the inconsistencies among the divergent lower court opinions and reconciling this body of law, in some important respects, with broader Title VII principles. In a concise opinion, the Supreme Court reversed the decision of the Fifth Circuit Court of Appeals, which had held as a matter of law that same-sex sexual harassment was not actionable. In a clear, decisive rejection of this categorical rule precluding all same-sex harassment claims, the Court explained:

---

292. See supra Part II.A.1-2.; see also Abrams, supra note 101, at 2516.
[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.  

In reaching this conclusion, the Court cited precedents extending men the same degree of protection under Title VII as women, as well as precedents recognizing that actionable discrimination can be perpetrated by members of the same protected class as the plaintiff. As the Court observed, it had previously recognized a viable claim brought by a male employee alleging that a male superior had "discriminated against him because of his sex when it preferred a female employee for promotion," and the Court had not "consider[ed] it significant that the supervisor who made that decision was also a man." Thus, the Court concluded, "if our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex." The Court accordingly reversed the decision below that, relying on the rule announced in Garcia, had held that same-sex harassment claims are not cognizable under Title VII. 

The Court then discussed the lower courts' "bewildering variety of stances" on the issue of same-sex sexual harassment. The Court noted that some cases had held that "same-sex sexual harassment claims are never cognizable under Title VII," while others had held that such conduct is actionable "only if the

294. Id. at 1002.
295. See id. at 1001 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) for the proposition that Title VII's proscription against discrimination "because of . . . sex" protects men as well as women").
296. See Oncale, 118 S. Ct. at 1000 (citing Castaneda v. Partida, 430 U.S. 482, 499 (1977), as authority "reject[ing] any conclusive presumption that an employer will not discriminate against members of his own race" because "it would be unwise to presume that human beings of one definable group will not discriminate against other members of that group").
298. Oncale, 118 S. Ct. at 1003.
299. See id.
300. Id. at 1002. As examples of cases adopting this position, the Court cited the opinion below, Oncale v. Sundowner Offshore Servs., 83 F.3d 118 (5th Cir. 1996), which had followed the categorical preclusion rule enunciated in Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994). The Court, however, also cited Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988), as an additional adherent to this categorical preclusion rule, in a highly contestable characterization of that opinion. See supra Part II.A.2 (discussing Goluszek's holding that
plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire). Still others, the Court continued, had suggested that "workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations."

Further explicating the scope of its holding that "nothing in Title VII necessarily" precluded same-sex sexual harassment claims, the Court rejected both the restrictive precedents requiring a showing of homosexual attraction to support a finding of the requisite sex-based causation, and the expansive view that all sexual conduct is, ipso facto, a form of actionable sex-based conduct. Addressing the cases that had focused on sexual attraction, the Court emphasized that although an inference of sex-based causation would be easy to draw in such circumstances, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." Thus, the Court effectively overruled the line of cases that had required a showing of homosexual attraction as a predicate to a same-sex sexual harassment claim.

Turning to the proposition that the sexual nature of the conduct is in itself sufficient to supply the necessary inference of sex-based discrimination, the Court decisively rejected this expansive construction of Title VII’s "because of . . . sex" language. As the Court emphasized, its precedents defining a cause of action for sexual harassment had, never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Accordingly, the Court clearly established that the same-sex sexual harassment claim it had recognized was neither so narrow as to arise only upon a showing of sexual attraction, nor so broad as to encompass every interaction

same-sex sexual harassment claims were not actionable absent a showing of an anti-male environment). The Court’s failure to examine the problematic implications of Goluszek is discussed more fully below. See infra notes 316-323 and accompanying text.

301. Oncale, 118 S. Ct. at 1002 (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996)).

302. Oncale, 118 S. Ct. at 1002. The Court cited Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998), as an example of such a case. As discussed at greater length below, this construction of Doe, like the Court’s characterization of Goluszek, is controversial. See infra notes 344-376 and accompanying text.

303. Oncale, 118 S. Ct. at 1002.

304. See id. In Scott v. Norfolk Southern Corp., No. 97-1490, 1998 WL 387192 (4th Cir. June 24, 1998), cert. denied, 119 S. Ct. 1252 (1999), the court, citing this portion of Oncale, recognized that Oncale "overrules previous precedent in this Circuit," as it had been established in McWilliams, and thus vacated an order that had relied on McWilliams to dismiss a same-sex sexual harassment claim. Scott, 1998 WL 387192, at *2.

with sexual overtones. It emphasized that the critical inquiry turned on whether the conduct constituted a form of discrimination based on sex within the meaning of Title VII. The Court focused intensively on this statutory requirement that the conduct occur “because of” the plaintiff’s sex, reiterating that “Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discriminat[ion]... because of... sex,” and that a Title VII plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discriminat[ion]... because of... sex.’”

Oncale, therefore, made significant strides toward resolving some of the tensions and inconsistencies that had pervaded the same-sex sexual harassment jurisprudence. The Court recognized that sex-based harassment, like other forms of sex-based discrimination, is actionable irrespective of the sex of the plaintiff or the sex of the perpetrator, and acknowledged that conduct need not be based on sexual desire to be based on sex. In doing so, the Court, in these important respects, reconciled same-sex sexual harassment doctrine with established standards for adjudicating sexual harassment claims. Having thus redirected the focus in same-sex sexual harassment cases away from the extraneous sexual orientation issues that had preoccupied some of the lower courts and back to the central “because of... sex” requirement, the Court set forth a brief exposition of some of the “evidentiary route[s]” that plaintiffs might follow in attempting to establish the requisite sex-based causal nexus. As discussed below, however, this portion of Oncale did little to elucidate the factual issues surrounding sex and gender dynamics in the context of male-on-male harassment, leaving the courts largely unguided in their determinations of the sex-based causation issues that frequently arise in same-sex harassment claims.

B. The Dilemma of Oncale’s Dicta: Perpetuating Problematic Tendencies in the Lower Courts’ Jurisprudence

Oncale’s holding affords numerous plaintiffs whose claims would have been foreclosed under the prior case law an opportunity to challenge same-sex sexual harassment as a form of sex-based discrimination prohibited by Title VII. Its dicta, however, reflect rigid, constrained conceptions of “sex” and sex-based causation that uncritically incorporate, and thus hold the potential to

307. Oncale, 118 S. Ct. at 1002. In a separate, one-sentence concurrence, Justice Thomas further emphasized this point, stating, “I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination “because of... sex.” Id. at 1003 (Thomas, J., concurring).
308. See supra Part I-B-C. (analyzing opposite-sex harassment cases that consistently recognize the sex-based nature of conduct that is based on aspects of the plaintiff’s sex, without requiring a showing of sexual attraction or hostility toward women in general).
309. See supra Part II-A.3 (discussing same-sex harassment cases that had required a showing of homosexual attraction).
310. Oncale, 118 S. Ct. at 1002.
perpetuate, many of the myths and misperceptions underlying the pre-Oncale jurisprudence. Specifically, these dicta implicitly conceive of “sex” primarily in terms of a biologically defined male-female dichotomy that emphasizes distinctions between males as a class and females as a class and in doing so obscures the numerous sex-based distinctions and potent, sex-based power dynamics that occur within each biological sex. Thus, these dicta, like many of the earlier analyses of same-sex sexual harassment, view each biological sex in an unrealistically monolithic manner and accordingly fail to acknowledge the significance of the individual sex- and gender-related attributes that distinguish members of one biological sex from one another and that are central to analyses of sex-based causation in the opposite-sex context.

Moreover, Oncale’s dicta echo and implicitly reinforce the tendency of some lower courts to view sexualized conduct, at least in the absence of genuine sexual desire, as a phenomenon that is distinct from sex-based conduct and that is devoid of sex-based and sex-discriminatory implications. These dicta thus obscure the integral role of certain forms of sexualized conduct in exploiting gender-based power differentials and perpetuating workplace gender hierarchies. Oncale therefore fails, in these critical respects, to advance jurisprudential understandings of the sex- and gender-based dynamics that operate in the same-sex harassment context.

1. “General Hostility” and “Direct Comparative Evidence:”
Adherence to the Myth of the Gender Monolith

After acknowledging the elementary proposition that sex-based motivations are more complex and diverse than sexual attraction, the Court endeavored to expound on other means by which a plaintiff could raise an inference that he had been singled out for harassment based on his sex. Its exposition, however, reflects the same tendency that had emerged from the lower courts to conceive of “sex” as a simple function of biological “maleness” or “femaleness,” and thus to view male sex identity as monolithic. This monolithic view ignores the complex sex-based distinctions among males that invoke gender stereotypes and paradigms of masculine sexual domination to define each individual male’s projected and perceived sex identity and status in terms of workplace gender hierarchies. The Court’s constrained construction of “sex” is apparent throughout its discussion of the “evidentiary route[s]” by which a plaintiff may establish that “the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of . . . sex.”

The Court proposed, as examples, two evidentiary routes that would support an inference that the conduct occurred because of sex. First, the Court stated, a trier of fact might reasonably infer the requisite sex-based causal nexus “if a female victim is harassed in such sex-specific and derogatory terms by another
woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." 313 Notably, the Court's allusion to "sex-specific and derogatory" conduct could encompass a broad range of gender-stereotyping and gender-subordinating conduct of the type that frequently occurs in same-sex as well as opposite-sex harassment cases, and that is based on the target's individual sex- and gender-related attributes that may or may not be shared uniformly by all members of the target's biological sex. 314 However, the Court then proceeded to restrict this language significantly by adding the qualification that the sex-specific, derogatory conduct arise from a "general hostility to the presence of" members of the target's biological sex. 315

By alluding to a "general hostility" toward an entire biological sex, the Court reverted to a biologically centered definition of "sex" as a construct denoting all males or all females by virtue of their membership in one of two biologically distinct classes, rather than as a concept alluding to aspects of an individual's projected and perceived sex or gender identity. In doing so, the Court echoed the conception of sex and sex-based causation implicit in Goluszek and its progeny, which required a showing of an "anti-male environment" in order to raise an inference that harassment, however sex-specific and derogatory toward sex-related aspects of the individual target, was based on the target's "sex." 316 The Court thus perpetuated the tendency that had arisen in some prior same-sex harassment cases to view each biological sex monolithically and to recognize as relevant to Title VII's sex-based causation inquiry only those aspects of "sex" that are shared uniformly by all members of the target's biological sex. This departure from the broader Title VII jurisprudence disregards the significance of the sex- and gender-defined aspects of an individual's identity that distinguish him from other members of his biological sex. 317

The second "evidentiary route" offered by the Court as a basis for inferring sex-based causation similarly formulates sex in terms of a dichotomy between two opposing, mutually distinct, but internally monolithic, biological categories. As the Court explained in this second example, "[a] same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." 318 The Court thus conceived of conduct based on sex as conduct that affects males in one manner and females in another, giving rise to a direct comparison across the biologically-defined divide. This conception of sex-based conduct, like the Court's "general hostility" language, similarly envisions an individual's sex in terms of two opposing biological groups, each of which is

313. Id.
314. See supra Part II.B (discussing common gender-discriminatory nature of forms of conduct that occur in same-sex as well as opposite-sex cases).
315. Oncale, 118 S. Ct. at 1002.
316. See supra Part II.A.2. (discussing reasoning behind Goluszek and its progeny).
317. See supra Part I.B-C. (analyzing cases outside same-sex sexual harassment context recognizing sex-based nature of conduct that is based on an individual's sex- or gender-related traits).
318. Oncale, 118 S. Ct. at 1002.
presumed to be monolithically composed of individuals who, by virtue of their shared biological traits, are assumed to be uniformly affected by the conduct in question.

Accordingly, these evidentiary examples—both of which are strikingly irrelevant to the conduct before the Court involving harassment of a male in a male-dominated workplace—evoke the Court’s view of an individual’s sex as a function of his or her membership in a class defined by biological sex, rather than as a protected aspect of the individual’s identity arising from his or her projected and perceived sex- and gender-related traits. The Court thus, in effect, constructed its examples of sex-based conduct around a conception equating Title VII’s “because of . . . sex” language with the biologically-centered construct “because he was a male.”

By framing its exposition of sex-based conduct around forms of conduct affecting males or females uniformly, as a monolithic biological sex, the Court did nothing to dispel the tendency of some prior same-sex sexual harassment cases to conceptualize sex in a biologically dichotomous, gender-monolithic manner as coterminous with biological sex. By its silence, the Court thus perpetuated this tendency to obscure the numerous sex- and gender-based distinctions among biological males that are exploited to subordinate certain individual males for reasons and through methods that are inextricably intertwined with their sex and gender identities.

The Court’s dicta offering examples of sex-based conduct do not purport to require the forms of evidence discussed therein, or to preclude plaintiffs from raising an inference of sex-based causation by other means. However, these dicta reverted to the constrained notions of sex that had been implicit in earlier cases that had, in fact, explicitly required evidence that the conduct had sex-based implications for an entire biological class rather than merely for an individual. The Court thus invoked, yet failed to comment on or reject, the reasoning that had led these cases to recognize sex-based conduct only where it affects all males uniformly as a monolithic biological sex.

This passive iteration of the logic underlying these same-sex sexual harassment precedents stands in stark contrast to the Court’s clear rejection of the cases that had required a showing of homosexual attraction as a predicate to a same-sex sexual harassment claim. The Court thus failed to correct one of

---


320. See supra Part II.B.2 (discussing ways in which same-sex sexual harassment invokes gender stereotypes and exploits gender-based power differentials to subordinate some men to others on the basis of sex- and gender-related attributes); infra notes 453-457 and accompanying text (same).


322. See supra notes 303-304 and accompanying text (discussing Court’s overruling of McWilliams and its progeny).
the most significant analytical flaws in the lower courts' jurisprudence.\textsuperscript{323} This failure introduces the risk that subsequent courts, although recognizing that allegations of same-sex sexual harassment state a claim as a matter of law, will approach the factual question of whether the conduct was based on the target's sex with the same problematic biologically-centered, gender-monolithic conceptions of sex characteristic of much of the prior jurisprudence. The unspoken assumptions underlying \textit{Oncale}'s dicta, if uncritically adopted by subsequent courts, hold the potential to impede many targets of same-sex sexual harassment in their efforts to prove the sex-based nature of conduct that is directed at them not simply because of their biological maleness, but because of aspects of their projected and perceived sex and gender identities that expose them to gender-stereotyping derision and gender-subordinating abuse.

2. \textit{"Explicit or Implicit Proposals of Sexual Activity:" Obscuring the Significance of Gender-Subordinating Sexualized Conduct}

The Court's dicta concerning the relevance of sexualized conduct similarly fail to dispel myths and misconceptions underlying the pre-\textit{Oncale} jurisprudence. As discussed above, the \textit{Oncale} Court confirmed that conduct need not be based on sexual desire to be based on "sex" within the meaning of Title VII.\textsuperscript{324} However, the allusions to sexual conduct in its dicta reveal a continued failure to acknowledge the integral role that sexualized conduct often plays in patterns of harassment that exploit gender-based power differentials and perpetuate workplace gender hierarchies. This conception thus reinforces the tendency apparent in some pre-\textit{Oncale} decisions to disregard the significance of sexualized conduct as a powerful instrument of gender-based subordination.

Apart from its statements that sexually suggestive conduct is not in itself sufficient to support an inference of sex discrimination,\textsuperscript{325} and that sexual attraction is not the only basis for inferring a sex-based causal nexus,\textsuperscript{326} the Court's only reference to the subject of sexually explicit conduct consisted of the following observation:

\begin{quote}
See supra notes 303-304 and accompanying text.
\end{quote}

\begin{quote}
See \textit{Oncale}, 118 S. Ct. at 1002.
\end{quote}

\begin{quote}
See \textit{id.}
\end{quote}
[c]ourts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume these proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging that the harasser was homosexual.327

This observation, which views sexual overtures as a product of presumed sexual desire, simply confirms what virtually all courts addressing the issue had recognized: that harassment is based on sex when it is based on a genuine attraction to persons of the target's biological sex.328

The Court did not, however, acknowledge that harassment often represents an effort to intimidate, humiliate, degrade, and demean the target rather than an attempt to initiate sexual relations or seek sexual gratification. In these instances, the conduct cannot accurately be characterized as a "proposal[ ] of sexual activity," regardless of whether the harasser is generally attracted to members of the target's biological sex, making the issue of the target's sexual preferences irrelevant.329 In failing to acknowledge forms of sexually explicit harassment that seek to intimidate, humiliate, degrade, and demean the target rather than to express sexual desire, the Court omitted any reference to the type of sexualized conduct on the record before it, which involved threats and acts of forcible sexual domination and abuse that could hardly be characterized as genuine proposals of sexual activity.330

By analyzing sexualized conduct separately from other forms of sex-based discrimination, and by implicitly characterizing such conduct as a product of presumed sexual attraction, the Court replicated the tendency of some prior cases to view sexual conduct in the absence of sexual desire as wholly unrelated to the target's protected sex- or gender-related traits.331 In doing so, the Court

327. Id. at 1002. This inference assumes, of course, that the harasser is not bisexual to any degree.

328. See supra note 128 (collecting cases consistently recognizing that same-sex sexual harassment is actionable where the harasser is genuinely attracted to persons of the target’s biological sex and observing that this aspect of same-sex sexual harassment jurisprudence has been far less controversial than harassment that is not based on attraction).

329. See supra notes 99-117 and accompanying text (discussing cases recognizing the sex-based nature of abusive, humiliating, intimidating, and degrading sexual conduct directed at women where there was no evidence of genuine sexual desire).

330. See Oncale, 118 S. Ct. at 1001 (stating that the plaintiff was "forcibly subjected to sex-related, humiliating actions" in which he was "physically assaulted . . . in a sexual manner" by multiple harassers and was repeatedly "threatened . . . with rape").

331. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1192-96 (4th Cir. 1996) (holding that absent sexual attraction, pattern of sexual derision, threats, and assaults cannot be deemed to have occurred because of target's sex within the meaning of Title VII); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (characterizing conduct as having "sexual overtones" and concluding without further analysis that such conduct was not based on "sex" within the meaning of Title VII because harasser and target were both male); Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1049, 1050-51 (N.D. Ala. 1996) (holding that "without the presumption of sexual gratification . . . there is no sex discrimination" and that the sexual conduct at issue constituted "mere locker room antics, joking, or horseplay.") The Court's dismissive characterization of Doe as holding that sexual conduct is "always actionable," which ignores Doe's insightful analysis of the gender-
failed to appreciate or examine the gender-based and gender-discriminatory nature, purpose, and effect of the sexual humiliation, intimidation, and abuse that operates in many same-sex as well as many opposite-sex sexual harassment cases as a potent means of asserting gender dominance. It thus left unexamined one the problematic assumptions that had unduly constrained the "because of . . . sex" analysis in some prior same-sex sexual harassment cases, posing the risk that courts analyzing same-sex sexual harassment issues in the future will replicate the same analytical errors of the past, and will continue to overlook the sex-based and sex-discriminatory implications of abusive, degrading sexual conduct.

C. Oncale's Resounding Silence: The Court's Failure to Countenance the Sex-Discriminatory Implications of Same-Sex Gender Stereotyping and Same-Sex Sexual Subordination

As explained above, Oncale's dicta reflect a constrained conception of sex that fails to redress the lower courts' tendencies to obscure gender-based distinctions among members of the same biological sex and to disregard the significance of sexualized, sexually subordinating conduct that exploits these gender-based differences. The following discussion examines Oncale's glaring omission of any analysis of the gender-based and gender-discriminatory dynamics that had been squarely presented on the record before it, that had been recognized in some prior same-sex sexual harassment cases, and that resonate most powerfully in all-male or male-dominated work environments.

In an opinion focused so intensively on emphasizing the central importance of the "because of . . . sex" requirement, the lack of guidance as to the application of this requirement in the context of the all-male work environment involved in the case before the Court, as in so many other same-sex harassment cases, is remarkable. The Court's dicta on sex-based causation remained silent as to male-on-male conduct, focusing instead on scenarios of "general hostility to the presence of women in the workplace" and "direct comparative evidence" as to the relative treatment of "both sexes in a mixed-sex workplace."

The Court's reluctance to address the issue of male-on-male sexual subordination is even more conspicuous in light of the powerful articulations of the sex-based and sex-discriminatory nature of the conduct that were presented to the Court. Oncale argued that his harassers "targeted [him] for harassing treatment and selected their method and manner of sexual harassment because

subordinating effect of certain forms of sexualized conduct, further obscures the sex-discriminatory significance of some expressions of sexuality. See infra notes 344-376 and accompanying text.

332. See supra Part II.B.2 (analyzing gender-discriminatory dynamics of same-sex sexual subordination); see also infra notes 346-356 and accompanying text (discussing Doe's analysis of sexual conduct as a form of gender-derogatory subordination).

333. See supra notes 305-307 and accompanying text (discussing Court's emphasis on this statutory requirement).

334. See, e.g., Oncale, 118 S. Ct. at 1001 (all-male oil rig crew); Doe v. City of Belleville, 119 F.3d 563, 566-67 (7th Cir. 1997) (all-male maintenance crew), vacated and remanded, 118 S. Ct. 1183 (1998); McWilliams, 72 F.3d at 1193 (all-male mechanical team self-identified as "lube boys").
he was a male and because of his sexual identity as a man." Amici curiae elaborated upon this assertion, explaining to the Court that Oncale was targeted for a campaign of verbal and sexual abuse because he "did not conform to traditional norms of masculinity" in that he did not participate in the "hypermasculine environment" that defined the standard of appropriate and tolerated conduct for a male in Oncale's workplace.

Moreover, in addition to setting forth the sex- and gender-based reasons why Oncale was targeted for the harassment, amici elucidated the gender-based power dynamics underlying the sexually explicit conduct through which the harassment was carried out. As amici explained, "[m]en are discriminated against based on their sex when sexually aggressed against by other men. They are targeted as men—usually as certain kinds of men—to be victimized through their masculinity . . . as individual members of their gender, as gender is socially defined." Amici then endeavored to dispel the "common myths" that "when a man sexually abuses another man, the actions are not sexual and not gender-based" because "[ma]sculinity is assumed to be uniform.

Contrary to this myth, amici explained, men commonly identify other males "as inferior men" and subject them to sexual exploitation and domination on that basis. Through this conduct, amici continued, harassers ensure that their targets are "stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors." This process "lowers the victim's status, making him inferior as a man by social standards," thereby "demean[ing] his masculinity . . . What he loses, he loses through gender, as a man" in a divestiture of gender-defined power that women cannot and do not experience.

The Court's reticence in the face of this incisive articulation of the gender-based distinctions among males and of the sex- and gender-discriminatory implications of the types of male-on-male sexual domination perpetrated against Oncale reveals a profound reluctance to grapple with the more complex aspects of sex identity, gender identity, and gender-based power dynamics. Instead of addressing amici's assertionscontroverting the myths that masculinity is monolithic and that male sexual domination of other males is gender-neutral, and instead of countenancing the possibility of males subordinating males for reasons inextricably related to their maleness,
masculinity, and gender-based power relations, the Court reverted to simplistic formulations of sex and gender that acknowledge only those gender issues that affect the two biological sexes differentially while affecting members of the same biological sex uniformly.  

The Court thus became complicit in the tendency of many same-sex sexual harassment cases to overlook the gender-based distinctions among members of the same sex and thus to disregard the powerful patterns of gender-based discrimination founded on the enforcement of gender stereotypes and the exploitation of masculinity-based sexual vulnerabilities among males. By doing so, the Court perpetuated the biologically dichotomous, gender-monolithic assumptions underlying some of the lower courts’ most restrictive analyses of same-sex sexual harassment claims and further obscured the significance of the projected and perceived gender attributes that the courts have recognized as centrally relevant to the sex-based causation inquiry in the opposite-sex context.  

Oncale’s treatment of the Seventh Circuit Court of Appeals’ opinion in Doe further demonstrates Oncale’s retrogressive adherence to the flawed assumptions of some of earlier same-sex harassment cases and its failure to recognize the complexities embodied in the term “sex” in a manner consistent with the meanings ascribed to the term in the opposite-sex context. In its only allusion to Doe, the Court described the decision as “suggest[ing] that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.” This description, however, mischaracterizes important aspects of the analysis set forth in Doe. The Doe court did, to be sure, indicate that it viewed the sexual conduct before it as sufficient to provide the required causal connection to the target’s sex. It did not, however, do so simply by construing Title VII’s “because of . . . sex” language to mean because of sexuality or sexual activity, rather than because of the plaintiff’s sex-based identity or traits. To the contrary, the court thoughtfully articulated the connections between a target’s subjection to unwelcome sexual conduct and his or her sex- and gender-based identity. As the court explained, numerous courts had implicitly recognized, in the opposite-sex context, that unwelcome sexual conduct often “reduces the target to a sexual object,” thus subordinating her in a manner that is “inescapably and irrevocably linked to her gender.”

342. See supra notes 311-323 and accompanying text (discussing biologically dichotomous, gender-monolithic assumptions implicit in Oncale’s dicta).

343. See supra Part I.B-C. (analyzing opposite-sex harassment cases that recognize the significance of plaintiff’s individual gender-related attributes and identity as a basis for sex-discriminatory harassment based on gender stereotyping).

344. See Oncale, 118 S. Ct. at 1002 (citing Doe v. City of Belleville, 119 F.3d 563, 563 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998)).

345. Oncale, 118 S. Ct. at 1002 (citing Doe, 119 F.3d at 563).

346. Doe, 119 F.3d at 579.

347. See id.; see also supra note 134 and accompanying text (discussing the alternate meanings of the word “sex”).

348. Doe, 119 F.3d at 579; see also supra notes 277, 305 and accompanying text (discussing debate as to whether sexual conduct is inherently sex-discriminatory).
The court then emphasized that it would be difficult to envision circumstances in which someone “intentionally grabs another’s testicles,” as the harasser had done in that case, “for reasons entirely unrelated to that person’s gender.” Nonetheless, the court did not base its finding of the requisite sex-based causal nexus solely on the sexual nature of the conduct, or on the presumption that the unwelcomeness of the conduct reduces the target’s status to that of a sexual object. Rather, the court proceeded to analyze the sexual conduct as a component of a broader pattern of gender stereotyping and gender subordination founded on gender-based distinctions between the target and the more powerful, masculine harassers. The court held that, even if the inference of sex-based causation did not arise from the “sexual character of the harassment itself,” it could be “inferred from the harassers’ evident belief that in wearing an earring, H. Doe did not conform to male standards, thus the repeated inquiries as to whether he was ‘a guy or a girl,’ for example.”

Accordingly, while the court noted that a strong inference of a sex-based motivation can arise from the sexual nature of the conduct, it based its holding on additional factors beyond sexual content that denoted a sex- and gender-based motivating factor behind the harassment in the case before it. The court noted that the conduct did not merely involve general sexual overtones or innuendoes, but rather was “targeted specifically” at Doe and “revolved around his gender.” The court also noted that Doe was referred to as his harasser’s “bitch,” and subjected to overt threats of rape and an actual physical assault in which the harasser grabbed his testicles to “finally find out” whether he was “a girl or a guy.” The court found that these “overt references to [Doe’s] gender and the repeated allusions to sexual assault” in which Doe was portrayed as the victim of violent penetration by the harasser supported the inference that Doe’s “gender had something to do with this harassment.” The court therefore concluded that, if additional proof of sex-based causation were necessary, the record before the court contained ample evidence that Doe was “singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworkers’ view of appropriate masculine behavior.” Thus, according to the Doe court, the sexual conduct, in the context of the other forms of gender-based derision, reflected an intent to ridicule, humiliate, and demean a less masculine male based on his status as a male and thus on his sex. As the court explained, the conduct:

---

349. Doe, 119 F.3d at 580.
350. Id. at 575.
351. See id. at 576.
352. Id.
353. Id. at 576-77.
354. Id. at 577.
355. Id.
was a grave intrusion upon [Doe's] sexual privacy and, given the remarks that accompanied the assault, an explicit comment upon his gender. . . .

The overall context of the harassment alleged in this case—the name-calling, the references to sexual assault, and the intrusive, intimate touching, all of which expressly invoked [Doe's] gender—certainly makes it reasonable to infer that the workplace was made hostile to him because of his gender. And to the extent that their mindset is pertinent, we also think that one can reasonably infer that [the harasser] and his cohorts chose to harass [Doe] in the way that they did with just this likelihood in mind—that is, that their intent was to humiliate him as a man.\footnote{356}

Thus, contrary to the \textit{Oncale} Court's dismissive reference to \textit{Doe} as a case simply suggesting that harassment that is "sexual in content is always actionable,"\footnote{357} \textit{Doe} presents a cogent analysis of the ways in which subordinating sexual conduct can reduce a target's status to that of a "sexual object" in a manner "inescapably and irrevocably linked to [the target's] gender,"\footnote{358} in order to impugn his masculinity and "humiliate him as a man."\footnote{359}

Just as the Court declined to countenance the arguments presented to it regarding the gender-based power dynamics through which dominant males brand other biological males as "inferior men" and subject them to sexual exploitation and domination on that basis,\footnote{360} so the Court declined to engage with \textit{Doe}'s analysis of the interrelationships between gender stereotypes, sexually abusive conduct, and the subordination of some men to others based on a hierarchy of masculinity.\footnote{361} Accordingly, the Court relinquished the opportunity presented in \textit{Oncale} to elucidate the relevance of sexual conduct in the sex-based causation inquiry and to dispel the monolithic misconceptions of sex that obfuscate patterns of gender-based subordination among males.

The Court's failure to acknowledge \textit{Doe}'s potential to illuminate the interrelationships between sex, sexuality, and sex-based causation in the same-sex sexual harassment context becomes even more striking upon examination of the Seventh Circuit's subsequent treatment of its own opinion in \textit{Doe}. In \textit{Johnson v. Hondo, Inc.},\footnote{362} which was decided well before \textit{Oncale}, the Court of Appeals, after discussing \textit{Doe}, concluded that the sexually explicit nature of the harassing conduct before it was not sufficient, under the circumstances, to support a finding that the harassment was based on sex within the meaning of

\footnotetext[356]{Id. at 580.}
\footnotetext[357]{\textit{Oncale}, 118 S. Ct. at 1002.}
\footnotetext[358]{\textit{Doe}, 119 F.3d at 579.}
\footnotetext[359]{Id. at 580. In contrast to the Supreme Court's suggestion that \textit{Doe} would forbid all forms of sexually suggestive conduct, this analysis would appear to proscribe only those that sexually objectify, humiliate, degrade, subordinate, or disempower a particular individual in a gender-specific manner.}
\footnotetext[360]{See supra notes 335-341 and accompanying text (recounting arguments presented to the Court).}
\footnotetext[361]{See \textit{Doe}, 119 F.3d at 580 (concluding that plaintiff was "singled out for [sexual] abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworkers' view of appropriate masculine behavior").}
\footnotetext[362]{125 F.3d 408 (7th Cir. 1997).}
Title VII. The harasser in Johnson made repeated vulgar comments, while gesturing with and manipulating his crotch, to the effect that he was going to make the target “suck [his] dick.”

The court affirmed the entry of summary judgment in favor of the defendant on the grounds that “[b]esides the sexual content of [the harasser’s] remarks there is absolutely nothing in this record that supports a reasonable inference that the remarks were directed at [the plaintiff] on account of his gender.” The court explained that, “[a]lthough explicit sexual content or vulgarity may often take a factfinder a long way toward concluding that harassing comments were in fact based on gender . . . this need not necessarily be the case.”

The court proceeded to analyze the significance of the harasser’s sexually explicit and offensive conduct in light of Doe. The court found “marked factual distinctions” between the forms of harassment directed at the plaintiff in each case. As the Johnson court explained, the circumstances of the harassment in Doe “converged to support the conclusion that the remarks and conduct involved in that case truly were gender-based.” The court observed that the conduct involved Doe’s “having his gender questioned,” repeated threats of sexual assault, and a physical assault on his testicles in a “proclaimed effort to determine once and for all whether he was male or female.” Moreover, the court emphasized, the sexual conduct in Doe reflected the harassers’ “expressed and exhibited hostility to the way in which [Doe] exhibited his sexuality” and to Doe’s “failure to conform to stereotypical male standards.”

The Johnson court found this pattern of gender-based conduct with sexual overtones distinguishable from the conduct at issue in the case before it, in which the vulgar sexual comments did not make “any reference, direct or indirect, to [the plaintiff’s] gender,” and did not escalate to physical assaults of a sexual nature. Consequently, the court found, the sexually explicit conduct directed at the plaintiff did not constitute the type of gender-based derision, intimidation, and subordination that was present in Doe. The court noted Doe’s dictum suggesting that “arguably” the sexual nature of the conduct “in

363. See id. at 414.
364. Id. at 410 & n.1.
365. Id. at 412.
366. Id.
367. Id. at 413.
368. Id.
369. Id.
370. Id. at 413-14.
371. Id. at 414.
372. Notably, the district court in Johnson found that “the evidence did not indicate that [the target] was at all intimidated by the harasser,” as the target, in contrast to Doe, who had left his job in fear, had “responded in kind” to the vulgar sexual comments, and had agreed to meet his harasser off company premises to engage in a physical altercation that resulted in the harasser’s being taken to the hospital. Id. at 411, 412 & n.4. The targets’ contrasting responses to the harassment reveal starkly contrasting circumstances as to the power differentials between the harasser and the target, supporting the Johnson court’s conclusion that the facts before it did not represent the type of gender-based subordination that was present in Doe, but rather reflected a “personal grudge match between two workers.” Id. at 412. In Raum v. Laidlaw, Ltd., No. 97-CV-111 (FJS), 1998 WL 357325 (N.D.N.Y. July 1, 1998), the court reached a similar conclusion that “obscene gestures and epithets” such as “fuck off” and “go fuck yourself” did not give rise to an inference that the plaintiff was targeted or subordinated because of his sex. Id. at *1-2 & n.1.
and of itself demonstrates the nexus to the plaintiff’s gender that Title VII requires.” The court emphasized, however, that Doe “did not ultimately rely on” this dictum because it “found sufficient additional evidence linking the conduct at issue to the plaintiff’s gender.”

Thus, it is apparent from the Seventh Circuit’s construction of its own precedent in Doe that sexualized conduct did not, ipso facto, amount to actionable sex harassment, but rather supported an inference of actionable sex-based conduct when the “‘overall context of harassment’” reflected a pattern of gender-based intimidation and ridicule. This subsequent treatment of Doe from within the same jurisdiction reveals the subtle, complex, and illuminating analysis of gender stereotyping and sexualized conduct in the same-sex context that the Oncale Court omitted by citing Doe for the proposition that conduct that is “sexual in content is always actionable.”

By ignoring the Seventh Circuit’s insightful analysis of the circumstances in which sexualized conduct operates as a form of gender subordination intended to intimidate and demean an individual because of his sex- and gender-related traits, the Oncale Court evaded the critically important issue addressed in Doe regarding the powerful role of certain forms of sexualized conduct in subordinating an individual based on his gender identity. The Oncale Court thus declined the opportunity to elucidate the gender-based dynamics that are most centrally relevant to applying the “because of . . . sex” requirement in the same-sex sexual harassment context.

Oncale, although emphasizing the critical nature of the sex-based causation inquiry and setting forth some methods of proving sex-based causation, confined its analysis of this issue to examples of sex-based conduct implicating an entire biological sex uniformly, omitting any reference to the sex-based dynamics that operate among males to create and enforce a gender-defined hierarchy on the basis of their projected and perceived masculinity. The Court thus remained strikingly silent regarding the asserted sex-based nature of the conduct before it, although powerful arguments articulating the sex-based and sex-discriminatory nature of male-on-male sexual domination were presented to the Court both in the briefs in Oncale and in lower court precedents that the Court cited for far simpler and less illuminating propositions.

By remaining conspicuously silent as to the asserted gender-based dynamics of the male-on-male conduct before the Court, Oncale left unexamined the biologically dualistic, gender-monolithic misconceptions that had pervaded the

373. Johnson, 125 F.3d at 414 n.7.
374. Id.
375. Id. at 415 n.7 (quoting Doe v. City of Belleville, 119 F.3d 563, 596 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998)).
376. Oncale, 118 S. Ct. at 1002. This characterization of Doe also diverges from the treatment of Doe in the briefs before the Court, which acknowledged that Doe “did not rest its holding entirely” on the sexual content of the conduct but “also relied on evidence of gender-stereotyping comments.” Respondent’s Brief at *30, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (No. 96-568, 1997 WL 634147).
377. See Oncale, 118 S. Ct. at 1002.
378. See supra notes 305-307 and accompanying text.
379. See supra notes 311-323 and accompanying text.
prior same-sex sexual harassment jurisprudence, and thus failed to attune the lower courts to the powerful patterns of male-on-male gender-based subordination that had evaded judicial recognition in the past. The Court’s reticence in response to the clearly asserted sex-based and sex-discriminatory nature of gender stereotyping and sexual domination among males has prompted speculation that the Oncale Court, far from decisively recognizing the sex-based and sex-discriminatory nature of such conduct, merely acknowledged in a hesitant, almost skeptical manner, that—in the Court’s guarded words—“nothing in Title VII necessarily” precludes recognition of theories of sex discrimination arising from such conduct. The following discussion examines the implications of Oncale in subsequent adjudications of same-sex sexual harassment issues.

D. The Ramifications of Oncale in the Lower Courts: The Continued Challenge of Distinguishing Actionable Sex-Based Harassment from Heterosexual “Horseplay”

The Oncale Court, in recognizing a cause of action for same-sex sexual harassment, vigorously emphasized the central importance of the “because of . . . sex” requirement as a means of distinguishing between innocuous “male-on-male horseplay” and “discriminatory conditions of employment.” Yet, as discussed above, the Court offered little guidance as to the application of this requirement in the context of male-on-male harassment, and did little to ensure that subsequent same-sex sexual harassment adjudications look beyond the monolithic formulations of sex implicit in many prior same-sex cases to the more sophisticated understandings of sex that have emerged in the broader Title VII jurisprudence.

Developments in the wake of Oncale reveal continued ambiguities on issues of sex-based causation in the same-sex sexual harassment context, and a continued jurisprudential failure to recognize the sex-based and sex-discriminatory implications of gender-based distinctions among males and of sexual conduct used to subordinate certain males on the basis of projected and perceived masculinity. Although the Supreme Court remanded Oncale for further proceedings that might have elucidated Oncale’s claim that he was sexually subordinated based on his gender-related attributes, the parties

380. Oncale, 118 S. Ct. at 1001. One commentator has observed that the terseness and brevity of Oncale, particularly when viewed in light of the opinion’s emphasis on the restrictions imposed upon the newly-recognized cause of action “may disguise disagreement” within the Court as to the application of Title VII in the same-sex sexual harassment context and may presage an intent to “expand[ ] the coverage but restrict[ ] the liability” under Title VII. David G. Savage, Signs of Disagreement: Scalia May Have Sown Seeds of Dissent in Same-Sex Ruling, A.B.A. J., May 1988, at 50-51.
381. Oncale, 118 S. Ct. at 1003 (internal quotations omitted).
382. See supra Part III.B. (discussing Oncale’s failure to dispel biologically dichotomous, gender-monolithic conceptions of sex); see also supra Part I.B-C. (examining formulations of “sex” implicit in opposite-sex sexual harassment cases).
383. See Oncale, 118 S. Ct. at 1003 (remanding case for further proceedings); see also supra notes 335-341 and accompanying text (discussing theories of sex-based discrimination argued in Oncale).
subsequently settled the case on the eve of trial,\textsuperscript{384} thus precluding further development of the factual and legal theories presented in that case.

Further compounding the lack of clarity regarding the application of sex-based causation principles to conduct among males is the Supreme Court's subsequent treatment of \textit{Doe}, which the Court vacated and remanded for reconsideration without setting forth its reasons.\textsuperscript{385} \textit{Oncale}'s holding that same-sex sexual harassment is actionable upon proof of the requisite sex-based causation is not, on its face, inconsistent with \textit{Doe}'s holding that the requisite sex-based causation could be inferred in that case from the pattern of gender-specific derision and sexual abuse intended to demean the target "as a man."\textsuperscript{386} The absence of a direct conflict between the holdings of the two cases makes the precise significance of the Supreme Court's vacatur of \textit{Doe} difficult to discern.

One plausible construction is, of course, an intent to highlight the Court's clear rejection of \textit{Doe}'s dictum suggesting that sexual conduct is in itself sufficient to supply the inference of sex-based discrimination.\textsuperscript{387} Nonetheless, some observers have construed the Court's vacatur of \textit{Doe} as a rejection of \textit{Doe}'s finding that an inference of sex-based causation could arise from gender stereotyping and sexually abusive, degrading conduct.\textsuperscript{388} Regardless of the Court's intent in vacating \textit{Doe}, its vacatur has the effect of casting doubt on the precedential value of \textit{Doe}'s reasoning, thereby limiting the influence of this opinion, which represents one of the few judicial attempts to conduct a careful examination of the sex-discriminatory significance of gender stereotyping and sexually degrading conduct among males.

Accordingly, in the aftermath of \textit{Oncale}, the same-sex sexual harassment jurisprudence remains virtually as devoid as ever of any consistent guiding principles for conceptualizing "sex" and sex-based causation in a manner that adequately captures the significance of each individual's sex- and gender-based identity and that comports with the more nuanced understandings of these concepts implicit in other areas of Title VII jurisprudence.\textsuperscript{389} Thus, these

\textsuperscript{386} See supra notes 344-377 and accompanying text (discussing \textit{Doe}'s holding and Supreme Court's characterization thereof).
\textsuperscript{387} Compare \textit{Oncale}, 118 S. Ct. at 1002 ("we have never held that . . . harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations") with \textit{Doe} v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1997) (questioning need for additional proof of sex-based causation where the "harassment has explicit sexual overtones"), vacated and remanded, 118 S. Ct. 1183 (1998).
\textsuperscript{388} See, e.g., Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 76 (D. Me. 1998) (suggesting that vacatur of \textit{Doe} may represent an expression of disfavor toward \textit{Doe}'s reliance on gender stereotypes as evidence of sex discrimination); see also Sorrow, supra note 11, at 715 (theorizing that Court's vacatur of \textit{Doe} reflects "unwillingness to allow instances of sexual harassment to form the basis of sexual harassment claims").
\textsuperscript{389} There is, however, at least one notable exception to this jurisprudential void regarding the sex-based dynamics at play in the same-sex sexual harassment context. See \textit{Zalewski v. Overlook Hosp.}, 692 A.2d 131, 134, 136 (N.J. Super. Ct. Law Div. 1996) (holding that "[a]bsent extenuating circumstances, it would seem difficult to prove that sexually explicit words or conduct between men" would constitute sex discrimination, but finding that the requisite extenuating circumstances existed where sexually explicit conduct was targeted at plaintiff "because he was a male who did not behave as they perceived a male should behave" with regard to sex and sexuality, thus raising the inference that the target was harassed in a sexually explicit manner as a form of "gender stereotyping").
complex issues of sex and sex-based causation are likely to remain highly contested and divisive, and may precipitate inconsistencies in the post-Oncale jurisprudence as "bewildering" as those that the Supreme Court confronted in Oncale.\textsuperscript{390}

Moreover, as a result of Oncale's silence regarding concepts of sex-based causation in the context of male-on-male harassment, the gender-based distinctions among men and the forms of sexual conduct that are used to assert power and dominance based on these distinctions are likely to remain hidden from judicial view. In part because of Oncale's failure to articulate an "evidentiary route" for raising an inference of sex discrimination based on gender distinctions among men, same-sex sexual harassment cases in the wake of Oncale continue to be framed in a manner that fails to accentuate the projected and perceived gender identities and gender-based power relations of the parties involved in the harassment.\textsuperscript{391} The resulting omission of these critically important gender dynamics further impedes courts' abilities to detect the sex-discriminatory implications of the forms of male-on-male harassment presented to them. In this respect, Oncale not only fails to dispel, but also contributes to perpetuating, the myth of the gender monolith.

One final aspect of Oncale bears emphasis. In addition to focusing intensively on the "because of . . . sex" requirement, Oncale emphasized that the Court's sexual harassment precedents recognized a cause of action only where the conduct was severe, pervasive, and "so objectively offensive as to alter the conditions of the victim's employment. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."\textsuperscript{392} The Court described these requirements as "crucial . . . to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory conditions of employment,"\textsuperscript{393} and as essential to "prevent Title VII from expanding into a general civility code."\textsuperscript{394}

\textsuperscript{390} Oncale, 118 S. Ct. at 1002 (describing "bewildering" inconsistencies in lower courts' jurisprudence). Several commentators have noted the unresolved ambiguities that remain in the wake of Oncale and the likelihood of resulting inconsistencies arising in the future. See Erwin Chemerinsky, Defining Sexual Harassment, 34 J. ASS'N TRIAL LAW. AM. 86 (May 1998) (noting that Oncale "did nothing to define" the "because of sex" requirement); Christine Cesare & Lisa Lerner, Same-Sex Harassment Leaves Employers to Grapple with Distinction, EMPLOYMENT LAW STRATEGIST, Apr. 1998, at 1, 1 (noting that the jurisprudence is "likely to remain unsettled for quite a while" as Oncale offers "little guidance on where to draw the line between a permissible fraternal atmosphere in the workplace and one that is tinged with unlawful discrimination by members of the same sex"); Sidney R. Steinberg, Supreme Court Decision in Oncale Answers Some Questions—Raises Others, ANDREWS EMPLOYMENT LITIG. REP., Apr. 14, 1998, at 3, 3 (contending that Oncale "raises, or at least leaves unresolved, a number of issues in this area of the law" with which "the lower courts will grapple for some time").

\textsuperscript{391} See, e.g., Schermer v. Illinois Dep't of Transp., No. 96-3427, 1999 WL 148034, at *3 (7th Cir. Mar. 19, 1999) (emphasizing that record contained "no evidence" as to plaintiff's gender-related attributes, harassed's perceptions thereof, or harasser's "idea of a stereotypical male" from which court might infer a gender-discriminatory motivation behind the sexually offensive conduct); Higgins, 21 F. Supp. 2d at 75 (discussing dearth of "gender-related facts before the Court" from which to infer causal nexus between harassment and target's gender identity).

\textsuperscript{392} Oncale, 118 S. Ct. at 1003 (citations and internal quotations omitted).

\textsuperscript{393} Id. (internal quotations omitted).

\textsuperscript{394} Id. at 1002.
The Court's emphasis on preventing Title VII from expanding into a "civility code" proscribing innocuous "horseplay" is remarkable in a case such as *Oncale* that did not involve mild insults, distasteful jokes, or sporadic incidents of questionable offensiveness. Rather, *Oncale* involved a relentless pattern of explicit threats of rape, culminating in physical assaults in which multiple harassers restrained Oncale, forced him into contact with another man's penis, and subjected him to forcible anal penetration with a foreign object amidst threats of anal rape. Nor is *Oncale* an anomaly. Numerous other same-sex sexual harassment cases have involved closely analogous examples of physical sexual assault and forcible simulations of oral or anal sodomy that were perpetrated by one or more harassers as part of a pattern of incessant verbal and physical abuse that would not be easily confused with "ordinary socializing" or "horseplay."

Thus, just as the *Oncale* Court framed its analysis of sex-based causation issues in a manner suggesting a reluctance to countenance the gender-based dynamics at play in the context of male-on-male sexual domination and abuse, so the Court framed its discussion of the severity, pervasiveness and offensiveness requirements in a manner that, to some extent, obscured the profound impact of the conduct at issue and trivialized acts of forcible sexual assault as something difficult to distinguish from mere "horseplay." Many of the lower courts that have cited *Oncale* for its insistence that harassment be severe, pervasive, and objectively offensive have proceeded to apply these requirements more strictly than ever. The lower courts' construction of

395. *cf. e.g., Smith v. Oakland Scavenger Co., Nos. 96-15601, 96-15797, 1997 WL 661335, at *2 (9th Cir. Oct. 16, 1997) (holding that incidents such as confronting plaintiff with pornographic magazine in her work area and placing a rodent among her tools were not sufficiently severe to give rise to hostile work environment); Vigil v. City of Las Cruces, No. 96-2059, 1997 WL 265095, at *2 (10th Cir. May 20, 1997) (holding that plaintiff's exposure to pornographic, sexually explicit pictures and sexual jokes did not rise to the level of actionable sexual harassment); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430-31 (7th Cir. 1995) (holding that handful of offensive remarks without any physical touching, overt propositions, or exposure to sexually graphic material did not constitute actionable harassment); Dwyer v. Smith, 867 F.2d 184, 187-88 (4th Cir. 1989) (affirming directed verdict for defendant despite evidence that female police officer was subjected to pornographic material placed in her station mailbox and to fellow officers' sexually explicit conversations); Devaughn v. City of Clanton, 992 F. Supp. 1318, 1324 (M.D. Ala. 1997) (holding that comments by employer in which he asked employee if she "needed any help with the paperwork" while she was in the bathroom, while inappropriate, were not sufficiently severe or pervasive to create a hostile work environment); Kantar v. Baldwin Cooke Co., No. 93C9239, 1995 WL 692022, at *4 (N.D. Ill. Nov. 20, 1995) (holding that occasional inquiries about plaintiff's sexual activities were not sufficiently severe or pervasive to give rise to a hostile environment claim).


397. *See supra* notes 276-286 and accompanying text (recounting and analyzing patterns of unwelcome sexual conduct perpetrated in same-sex sexual harassment cases).

398. *Oncale*, of course, did not suggest that the conduct directed at Joseph Oncale was not sufficiently severe, pervasive, or objectively offensive to satisfy the requirements of the sexual harassment jurisprudence. However, its emphatic recitations of these requirements as "crucial" to distinguishing between actionable conduct and mere horseplay suggests that the severely degrading impact of unwelcome sexual conduct directed at males was perhaps not as self-evident to the Court as it might have been if similar conduct had, for instance, been directed at a woman.

399. *See. e.g., Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 877 (N.D. Ind. 1998) (citing *Oncale* and holding that "only extreme conduct can be said to discriminatorily alter the terms and conditions of employment"); Raum v. Laidlaw, Ltd., No. 97-CV-111(FJS), 1998 WL 357325, at *2 (N.D.N.Y. July 1, 1998) (citing *Oncale* and discussing plaintiffs' "heavy burden" of establishing that the conduct in issue was "not merely
The Myth of the Gender Monolith

Oncale as inviting particularly rigorous scrutiny of sexual harassment claims suggests that the courts may have detected, beneath Oncale’s overt holding recognizing same-sex sexual harassment claims as a matter of law, an underlying skepticism toward such claims as a matter of fact. Although Oncale provides targets of same-sex sexual harassment a cause of action challenging such conduct, its dicta discussing the parameters of same-sex sexual harassment claims reveal a reluctance to recognize fully the potent sex-based dynamics and severely debilitating impact of many forms of male-on-male sexual harassment, and a reversion to some of the restrictive assumptions underlying the prior same-sex sexual harassment jurisprudence.

These tendencies, if replicated in the lower courts, would significantly impede same-sex harassment plaintiffs in their efforts to prove the sex-based causal nexus and the severity, pervasiveness, and offensiveness that they must establish in order to prevail on their claims. Under this constrained approach to adjudicating same-sex harassment issues, remedies for many forms of male-on-male sexual harassment would, as a practical matter, remain nearly as elusive as they had been under many of the pre-Oncale precedents. This restrictive analysis of same-sex harassment issues thus threatens to eviscerate the significance of Oncale’s recognition of a same-sex harassment cause of action, reducing it to a largely Pyrrhic victory for many targets of such conduct. However, as discussed below, nothing in Oncale compels the lower courts to adhere to the same unexamined assumptions or to replicate the same analytical flaws in their determinations of the factual questions central to same-sex sexual harassment claims. Thus, the following part urges the lower courts to look beyond the myths and misconceptions implicit in the interstices of Oncale’s dicta and to undertake their own analyses of the concepts of sex, sex-based causation, and severity, pervasiveness and offensiveness in their adjudications of same-sex sexual harassment issues.

IV. PLACING ONCALE IN ITS PROPER CONTEXT:
TOWARD A SEX-BASED CAUSATION ANALYSIS THAT COMPORTS
WITH CONTEMPORARY UNDERSTANDINGS OF “SEX”

Part III of this Article demonstrates that, although the Oncale Court was confronted with allegations of male-on-male sexually subordinating conduct perpetrated on the grounds of masculinity-based distinctions among biological males, it remained conspicuously silent regarding the asserted sex-based and sex-discriminatory implications of such conduct. In doing so, it adhered to biologically centered, gender-monolithic conceptions of sex and sex-based causation that obscure gender-based distinctions among members of the same
biological sex.\footnote{400} While some observers have construed Oncale’s constrained analysis as an implicit rejection of broader theories of sex-based causation founded on an individual’s projected and perceived gender-related attributes,\footnote{401} this part contends that such a construction is unjustified. Because Oncale does not endeavor to alter fundamental precepts elucidating notions of “sex” and sex-based causation under Title VII, lower courts should neither uncritically adopt, nor draw unwarranted inferences from, the constrained formulation of “sex” implicit in Oncale’s dicta.

Rather, the courts should conduct independent analyses of whether the conduct before them satisfies statutory standards pertaining to sex-based causation. A principled adjudication of this issue, this part argues, must rest on the same broad formulations of “sex” that have emerged from both the established Title VII jurisprudence and the contemporary scholarship illuminating the nature of sex and sexual identity. These formulations of “sex” properly recognize the integral role of gender stereotypes and sexual interactions in defining a person’s projected and perceived sex and gender identity, and thus emphasize the aspects of “sex” that are most relevant to the workplace interactions and power dynamics with which Title VII is primarily concerned. Accordingly, it is these conceptions of sex and sex-based causation, rather than the narrow dicta in Oncale, that should inform adjudications of sex-based causation issues in the context of same-sex sexual harassment claims.

A. Legal Formulations of “Sex:” Recognizing the Broad Array of Sex-Based Motivations

As discussed above, Oncale’s dicta on the issue of sex-based causation reflect a narrowly circumscribed, biologically defined conception of “sex.”\footnote{402} These dicta, however, do not purport to supplant the significant body of precedent construing Title VII’s “because of . . . sex” requirement. Therefore courts must not confine themselves to the constrained, biologically dualistic notions of sex and sex-based causation underlying Oncale’s dicta. Rather, they must conduct their own rigorous, principled analyses of the sex-based and sex-discriminatory implications of the conduct before them in accordance with established legal doctrines of sex-based causation. By eschewing a simplistic focus on an individual’s biological sex and by emphasizing instead the diverse

\footnote{400. See supra Part III.B.}

\footnote{401. See supra note 388 and accompanying text (citing cases and commentary questioning viability of gender-stereotyping theory of sex-based causation in the wake of Oncale and the vacatur of Doe); see also Klein v. McGowan, No. Civ. 97-1915 DWF/AJB, 1999 WL 88828, at *4-6 (D. Minn. Feb. 16, 1999) (citing Oncale and rejecting plaintiff’s claim that he was targeted based on his “masculinity” because “the workplace at issue here was almost entirely male, and there is no allegation that anyone other than plaintiff was subjected to the allegedly harassing conduct”); Holman v. Indiana, 24 F. Supp. 2d 909, 915 (N.D. Ind. 1998) (citing Oncale as requiring proof of disparate treatment directed toward “members of one sex,” and thus rejecting sexual harassment claims of male and female plaintiffs who were each subjected to gender-specific degradation that “would not have occurred ‘but for’ the sex of each plaintiff,” and that demeaned each plaintiff in a gender-specific manner based on each plaintiff’s individual gender-related traits).}

\footnote{402. See supra Part III.B (discussing concepts of sex and sex-based causation implicit in Oncale’s dicta).}
aspects of an individual’s projected and perceived sex- and gender-based identity, these doctrines recognize the sex-based nature of a broad range of interactions that are influenced in various ways by aspects of a person’s sex.

1. Doctrines of Sex-Based Causation

The notions of sex and sex-based conduct that have emerged in Title VII cases brought by women reflect a broader, more flexible construction of the “because of . . . sex” requirement than the biologically centered formulation implicit in much of the same-sex jurisprudence. This broader construction transcends the focus on the plaintiff’s status as a biological male or biological female to recognize the sex-based nature of diverse forms of conduct that are based on any aspect of the plaintiff’s projected and perceived sex or gender identity or on gender-stereotyped expectations imposed upon the plaintiff. The broader Title VII jurisprudence has conceived of “sex” expansively as a complex, multifaceted notion embracing an array of individual sex- or gender-related attributes that, alone or in conjunction with other factors, define the identity and image that the plaintiff projects in the workplace. Based on this broader, more flexible conception of an individual’s “sex” and the myriad ways in which it affects his or her status in relation to others, the courts have recognized the actionable sex-based nature of a broad range of actions that are motivated in some respect by these aspects of an individual’s sex-related identity. In these cases, the acts have been held to constitute actionable sex-based conduct regardless of whether they implicate only the plaintiff as an individual, a distinct subset of the plaintiff’s biological sex, or the plaintiff’s entire biological sex.

Courts have long recognized that Title VII’s reference to conduct based on an individual’s “sex” is, in essence, a reference to conduct based on the individual’s gender identity, because gender identity encompasses the socially constructed and socially relevant aspects of an individual’s sex. Accordingly, the courts have recognized that conduct based on gender-stereotyped perceptions of the plaintiff is, in effect, conduct based on the plaintiff’s sex within the meaning of Title VII. In Price Waterhouse v. Hopkins, for instance, the Supreme Court found that the employer had impermissibly discriminated on the basis of “sex” when it “acted on the basis of gender” by penalizing the plaintiff for failing to walk, talk, dress and groom herself “more femininely.” And in the context of sexual harassment, no less than in other


404. 490 U.S. 228 (1989).

405. Id. at 235, 240.
areas of Title VII jurisprudence, the courts have consistently recognized that harassment based on gender-stereotyped notions of how an individual should appear and behave constitutes harassment based on that individual's sex.\(^{406}\)

Moreover, because Title VII's expansive "because of . . . sex" language contains no restrictions as to the precise causal role a person's sex must play in prompting the challenged conduct, courts have construed this requirement broadly to encompass any conduct treating the plaintiff "in a manner that but for that person's sex would be different."\(^{407}\) Under this broad, "but for" conception of sex-based causation, which is well entrenched in the Title VII jurisprudence, the target's sex need not be the sole, exclusive, or even predominant motivating factor, as long as the challenged conduct was, in some respect, founded "upon sex-based considerations."\(^{408}\) In the context of sexual harassment, courts have applied these principles to recognize the sex-based nature of conduct that invokes gender stereotypes, gender-based epithets, and gender-laden images of sexual subordination to demean the target in a gender-specific manner.\(^{409}\) Significantly, courts have found these indicia of the gender-based nature of the conduct sufficient to satisfy Title VII's sex-based causation requirement, even where other, facially gender-neutral factors, such as interpersonal conflicts\(^{410}\) or bias against other aspects of the target's identity also play a significant causal role in prompting the harassment.\(^{411}\)

The courts' response to discrimination claims brought by women of color is particularly instructive. Some courts initially rejected discrimination claims brought by black women on the grounds that the challenged conduct was not actionable sex discrimination because it was not directed at white women, and yet was not actionable race discrimination because it was not directed at black

---

406. See supra Part I.B.2 (analyzing cases recognizing actionable sex-based nature of harassment that is directed at individuals based on their failure to conform to gender stereotypes).

407. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978); accord Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1995) (holding that requisite sex-based causation is established where: (1) gender was a substantial factor in motivating the conduct; and (2) the conduct would not have occurred if the plaintiff were a man); Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (holding that "[b]ut for her womanhood" the conduct "would never have" occurred).


409. See supra Part I.B.C.


men.\textsuperscript{412} Subsequently, however, the courts began to recognize the fallacy of this reasoning predicating a plaintiff's right to challenge sex- or race-based conduct on the irrelevant fact of whether the conduct also affected other members of the plaintiff's sex or race. Accordingly, these courts acknowledged that the plaintiff's sex, albeit in conjunction with other factors, played a causal role in prompting the conduct, bringing the conduct within the purview of Title VII's "because of . . . sex" language regardless of whether the plaintiff's female sex was the sole cause of the conduct, regardless of whether her sex became a basis for hostility only when combined with other aspects of her identity, and regardless of whether the conduct was directed at any other members of the female sex.\textsuperscript{413}

In a similar line of cases, the courts have recognized a "sex-plus" theory of sex discrimination, which acknowledges the sex-based nature of conduct that is directed only at certain individual members of one sex, based on an individual attribute that would not elicit the same negative perceptions when exhibited by members of the other sex. These cases thus recognize the sex-based nature of conduct that affects a sub-class within the male or female biological sex based upon factors that are distinct from the plaintiff's biological sex, but that become a basis for adverse treatment in light of the plaintiff's biological sex.\textsuperscript{414} In \textit{Phillips v. Martin Marietta Corp.}, for instance, the Supreme Court found that an employer's refusal to hire women with young children while hiring men with young children constituted sex discrimination. Although the employer had no bias against women in general, as evidenced by the fact that over seventy-five percent of the employees hired for the position in question were women, the Court recognized that the adverse treatment was nonetheless based on sex, because it affected particular women by virtue of gender-based expectations and assumptions regarding the role of women in childrearing that were not imposed upon similarly situated men.\textsuperscript{415} Thus, although the policy did not affect

\begin{footnotesize}
\begin{enumerate}
\item[412.] See, e.g., DeGraffenreid v. General Motors, 413 F. Supp. 142, 143 (E.D. Mo. 1976) (rejecting sex and race discrimination claims brought under Title VII by five black women on grounds that conduct was not actionable because it was not directed against all women or all blacks), aff'd in part on other grounds, 558 F.2d 480 (8th Cir. 1977); see generally Kimberle Crenshaw, \textit{Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics}, 1989 U. CHI. LEGAL F. 139 (discussing DeGraffenreid as an example of the need to address the intersection of race and sex discrimination).
\item[413.] See, e.g., Lam v. University of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (recognizing a viable Title VII claim challenging conduct based in part on sex and in part on race); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (recognizing hostile environment claim based on "aggregate evidence of racial hostility with evidence of sexual hostility"); Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) (upholding sex discrimination claim where harassment was based in part on race); Arnett v. Aspin, 846 F. Supp. 1234, 1238-39 (E.D. Pa. 1994) (recognizing Title VII claim for "sex-plus-age" discrimination); see generally Rosalio Castro & Lucia Corral, Comment, \textit{Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims}, 6 LA RAZA L.J. 159, 169 (1993) (advocating relief for women of color who are discriminated against because of their sex and race, even though "employer[s] treat[ ] other members of [their] larger class more favorably"); Kimberle Crenshaw, \textit{Race, Gender, and Sexual Harassment}, 65 S. CAL. L. REV. 1467, 1472 (1992) (discussing "the intersections of racism and sexism" in defining treatment of women of color).
\item[415.] See id. at 543. The Court, after finding that the employer's policy gave rise to a \textit{prima facie} case of sex discrimination, remanded the case for further proceedings as to whether the policy was legally justified in distinguishing between men and women based on their differing family obligations. See id. at 544. In a separate
\end{enumerate}
\end{footnotesize}
women in general, as a biological sex, it nonetheless fell within Title VII's "because of . . . sex" language because it affected particular women for reasons related to their gender and others' gender-based perceptions of them.

Likewise, in subsequent cases, the courts have recognized numerous forms of actionable sex-based discrimination where the adverse actions affected only certain women who were singled out based on separate, additional attributes such as pregnancy,\textsuperscript{416} fertility,\textsuperscript{417} or marital status.\textsuperscript{418} In each of these instances, the challenged conduct was not directed at women in general, and was not directed toward particular women because of their biological status as females \textit{per se}, but rather was directed only at a subset of women who exhibited particular attributes. Although the conduct was prompted most directly by attributes that were distinct from the plaintiffs' status as women, the courts nonetheless recognized that the conduct was based on the women's sex, because the other attributes assumed their significance to the employer and became a basis for adverse treatment in the workplace only in light of gender-based norms regarding women's maternal and domestic roles. Similarly, in the specific context of hostile environment sexual harassment, the courts have not required evidence of hostility toward women as a biological sex, but rather have recognized the actionable sex-based nature of conduct that was targeted at a distinct subset of women, such as those who "were vulnerable because of marital problems and financial dependency on their jobs."\textsuperscript{419}

Thus, outside of the same-sex sexual harassment context, the "because of sex" analysis does not turn on a rigid or mechanistic inquiry into whether the conduct is targeted at "males" or "females" as a distinct biological sex, or whether the conduct is targeted at an individual solely because of his or her biological identity as a male or female. Rather, the sex-based causation analysis entails a more complex, individualized inquiry into whether the challenged conduct is directed at an individual for reasons arising from his or her sex or gender identity and the gender stereotypes and expectations associated therewith. Implicit in this significant body of Title VII jurisprudence is a notion of sex, not as a function of the plaintiff's membership in one of two biological classes, but rather as an attribute of the plaintiff as an individual that, like the plaintiff's other individual attributes, affects his or her interactions with others. Under this conception of a plaintiff's sex, the plaintiff is subjected to improper conduct "because of sex" whenever this aspect of the plaintiff's identity, whether alone or in conjunction with other attributes, plays a causal role in prompting the adverse treatment.

\textsuperscript{418} See, e.g., Fisher v. Vassar College, 70 F.3d 1420, 1433-34 (2d Cir. 1995), reh'g en banc granted on other grounds, 114 F.3d 1332 (2d Cir. 1997), and cert. denied, 118 S. Ct. 851 (1998); Bryant v. International Schs. Servs., Inc., 675 F.2d 562, 573 n.18 (3d Cir. 1982); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197-98 (7th Cir. 1971).
\textsuperscript{419} Horn v. Duke Homes, 755 F.2d 599, 602 (7th Cir. 1985).
In accordance with these broad, flexible doctrines of sex-based causation, the gender-stereotyping and sexually subordinating harassment that characterizes so many same-sex sexual harassment cases constitutes actionable conduct that occurs “because of” the target’s “sex.” Such conduct penalizes certain males for failing to conform to gender-based norms of appropriate appearance, demeanor, and sexual expression, and for exhibiting traits such as sexual inexperience, shyness, prudery, or distaste for sexual vulgarity that do not elicit the same adverse reactions when exhibited by women. Because these traits assume their significance to the perpetrators only in light of the target’s sex and the gender-based expectations that flow therefrom, the target’s sex plays a but-for causal role in prompting the adverse treatment and in determining its gender-specific content.

Under this well-established sex-based causation analysis, the “but for” causal role of the plaintiff’s sex establishes the requisite sex-based causal nexus and ends the inquiry, regardless of whether other factors, such as the plaintiff’s mental impairments, social unpopularity, or sexual orientation, also played a concurrent causal role, and regardless of whether the conduct affects other members of the plaintiff’s biological sex. Because Oncale does not set aside any of these doctrines guiding the sex-based causation analysis, a proper adjudication of sex-based causation issues in the context of same-sex sexual harassment claims must be founded on a rigorous application of these doctrines to the facts of the case. Although Oncale’s dicta uncritically revert to the more constrained conceptions of sex-based causation implicit in many same-sex sexual harassment cases, courts must resist the tendency to do the same, and must ensure that they adjudicate such claims in a manner that comports with established standards under Title VII.

420. See supra Part II.B.
421. See, e.g., Goluszek v. Smith, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988) (plaintiff was sexually inexperienced); Zalewski v. Overlook Hosp., 692 A.2d 131, 131 (N.J. Super. Ct. Law Div. 1996) (plaintiff was harassed in part because he was believed to be a virgin).
422. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193-96 (4th Cir. 1996) (plaintiff was perceived as shy and prudish and had a learning disability); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 138 (S.D. Tex. 1993) (plaintiff was harassed by co-workers because he wouldn’t “engage in their dirty conversations” and “complained of [their] use of profanity” as well as because co-workers were jealous of the plaintiff’s union status and resentful of his complaints).
424. See, e.g., Quick v. Donaldson Co., 90 F.3d 1372, 1374-75 (8th Cir. 1996); Oncale, 118 S. Ct. at 1001; Doe v. City of Belleville, 119 F.3d 563, 566-67 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998).
426. See supra notes 408-419 and accompanying text (discussing principles of sex-based causation that recognize sex-based nature of conduct based on sex-related traits or gender-based perceptions either alone or in combination with other factors).
427. See supra Part II.A.1-3. (discussing pre-Oncale cases rejecting same-sex sexual harassment claims on various grounds even where aspects of the target’s sex played a but-for causal role in bringing about the harassment); supra Part III.B (discussing biologically centered, gender-monolithic conceptions of sex and sex-based causation implicit in Oncale’s dicta).
428. Cf. supra notes 388, 401 (discussing post-Oncale cases applying unduly constrained conceptions of sex-based causation).
2. Principles of Consistent Application

While the foregoing Title VII doctrines establish broad, flexible standards for assessing the sex-based nature of challenged conduct, equally well-established Title VII principles mandate that the same broad, flexible standards that have emerged in cases brought by women must be applied in the same-sex sexual harassment context. According to these principles, the standards for adjudicating Title VII issues must be applied consistently, and must not be altered in light of the fact that the plaintiff is male or that the harasser and the target share the same biological sex. The courts have been strident in ensuring that Title VII's protections extend not only to members of groups traditionally victimized by employment discrimination, but also to members of groups that have traditionally dominated the employment market. Thus, the courts have afforded male plaintiffs the same protection under Title VII as female plaintiffs, much as they have afforded white plaintiffs the same rights under Title VII as members of minority races. In accordance with these precepts, sexual harassment doctrines have developed in a gender-neutral manner to ensure that male targets of such conduct receive the same statutory protection as female targets of comparable conduct.

429. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (holding that Title VII's prohibition on sex discrimination protects men as well as women); McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273, 278-79 (1976) (stating that Title VII's coverage is "not limited to discrimination against members of any particular race"); Notari v. Denver Water Dep't, 971 F.2d 585, 588 (10th Cir. 1992) ("Title VII's protection is not limited to those individuals who are members of historically or socially disfavored groups."); Lamphear v. Prokop, 703 F.2d 1311, 1314-15 (D.C. Cir. 1983) ("Title VII prohibits discrimination against white males upon the same standards that it prohibits discrimination against members of a racial minority."). The legislative history of Title VII, although sparse on issues of gender, reflects this intent to protect men to the same extent as women, and to afford all persons, including men and women of all races, equal opportunities in the employment market. When asked whether the proposed legislation would protect men as well as women and whites as well as members of minority races, the chairman of the judiciary committee responded that the statute would cover "white men and white women and all Americans" in addition to members of historically disadvantaged groups. 110 Cong. Rec. 2578 (1964).

430. The EEOC Compliance Manual instructs "[a] man as well as a woman may be the victim of sexual harassment," and that "a woman as well as a man may be the harasser." EEOC Compl. Man. (CCH) 615.2(b)(1) (1981). The Supreme Court has recognized that sexual harassment can be debilitating to men as well as women in its gender-neutral pronouncement that, "[s]urely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." Merrin v. Vinson, 477 U.S. 57, 66-67 (1986) (citing Henson v. City of Dundee, 682 F.2d 897, 902 (1982)). Numerous other courts have noted these principles of gender-neutrality in their analyses of sexual harassment doctrine. See Fredette v. BVP Management Assoc., 112 F.3d 1503, 1505 (11th Cir. 1997) (holding, in sexual harassment case, that "[t]he obvious Congressional focus on discrimination against women has not precluded the courts from extending the protections of Title VII to men."); Johnson v. Hondo, Inc., 940 F. Supp. 1403, 1409 (E.D. Wis. 1996) (stating, in context of sexual harassment claims, that "[t]he statutory language of Title VII is non-exclusive and protects all employees from gender discrimination inflicted by an 'employer'"); aff'd, 125 F.3d 408 (7th Cir. 1997); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 400 (D. Minn. 1996) ("[T]he language of Title VII is gender neutral."); Peric v. Board of Trustees of Univ. of Ill., No. 96 C 2354, 1996 WL 515175, at *2 (N.D. Ill. Sept. 6, 1996) ("The statute is clearly worded in gender neutral terms, and no legislative history exists to contradict a gender neutral reading."). The standards for analyzing the offensiveness of sexually harassing conduct are also framed in gender-neutral terms. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that hostile environment sexual harassment is actionable only when it renders the environment hostile or abusive from the perspective of a "reasonable person"); Ellison v. Brady, 924 F.2d 872, 879 n.11 (9th Cir. 1991) (holding that "where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man").
principles as a basis for recognizing a cause of action for male targets of sexual harassment.\(^{431}\) The same principles dictate that male plaintiffs be afforded the same opportunity as their female counterparts not only to state a claim challenging hostile or abusive conduct, but also to prove the requisite sex-based nature of that conduct under the same statutory standards of sex-based causation. It is firmly established that harassment directed at women that is based on gender stereotypes and that exploits gender-based vulnerabilities to sexual domination constitutes actionable harassment "because of sex."\(^{432}\) Accordingly, in order to achieve the parity of protection that Title VII seeks to guarantee to male and female plaintiffs, such forms of gender subordination must be recognized as actionable sex-based harassment when directed at males as well as when directed at females.

Moreover, a distinct set of Title VII principles dictates that, just as the male identity of the plaintiff does not alter the broad definitions of sex-based causation, nor does the male identity of the perpetrator. The courts have refused to restrict a plaintiff's right of action under Title VII based on the identity of the perpetrator or the fact that the perpetrator and the plaintiff belong to the same protected class.\(^{433}\) Rather, the courts have recognized that, "[b]ecause of the many facets of human motivation, it would be unwise to presume that human beings of one definable group will not discriminate against other members of that group."\(^{434}\) While the Oncale Court recited this principle as a basis for concluding that male targets of sexual harassment should not be denied a cause of action simply because the perpetrator was also male,\(^{435}\) the same logic dictates that male plaintiffs should not be denied the opportunity to prove the sex-based nature of the conduct, in accordance with established statutory standards, simply because the perpetrator was also male. Pursuant to this logic, conduct that invokes gender-based stereotypes and exploits gender-based vulnerabilities is no less likely to be motivated by some aspect of the target's "sex" when it is perpetrated by someone of the same biological sex than when it

\(^{431}\) See Oncale, 118 S. Ct. at 1001 (citing Newport News Shipbuilding, 462 U.S. at 669).

\(^{432}\) See supra Part I.B-C.

\(^{433}\) See, e.g., Johnson v. Transportation Agency, 480 U.S. 616 (1987) (analyzing sex discrimination claim brought by male plaintiff contending that his sex played a role in his male supervisor's decision to favor a female candidate).

\(^{434}\) Castaneda v. Partida, 430 U.S. 482, 499 (1977). Based on its recognition that people are fully capable of discriminating against others based on traits which they might in some respects share, the Castaneda court rejected any conclusive presumption that an employer will not discriminate against members of his own race. See also Hill v. Mississippi State Employment Serv., 918 F.2d 1233 (5th Cir. 1990) (recognizing that black persons can discriminate on the basis of race against other black persons); Hurborough v. City of Elkhart Parks & Recreation Dep't, 802 F. Supp. 199, 206 (N.D. Ind. 1992) (recognizing a cause of action for intra-race discrimination and instructing that the trier of fact must focus not on physiognomic characteristics, but rather on whether the perpetrator discriminated against the plaintiff based on a protected identity trait); Veatch v. Northwestern Mem'l Hosp., 730 F. Supp. 809, 817 (N.D. Ill. 1990) (holding that "[t]he fact that a woman fired a woman or a black fired another black does not demonstrate that the supervisor's decision was free of the racial and gender stereotyping that federal law attempts to remove from employers' decision making"); Walker v. Secretary of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989) (recognizing cause of action for race-based discrimination perpetrated against member of plaintiff's own race); Jordan v. Wilson, 649 F. Supp. 1038, 1059 n.15 (M.D. Ala. 1986) ("This court would have to be truly naive to assume that women cannot sexually discriminate against women and that many women do not harbor stereotypical, limited views of themselves.").

\(^{435}\) See Oncale, 118 S. Ct. at 1002-03 (citing Johnson, 480 U.S. at 616, and Castaneda, 430 U.S. at 499).
is perpetrated by someone of the opposite biological sex. Thus, these Title VII principles compel recognition of the fact that males are fully capable of harboring and acting upon gender-based preconceptions about other males, and preclude courts from properly imposing stricter standards of proof for sex-based causation than they would in opposite-sex cases either because the target is male or because the challenged conduct occurred between members of the same biological sex.

3. *Purposes of Title VII*

The statutory language and legislative history of Title VII lend further support to a construction of Title VII's "because of . . . sex" requirement that will encompass all patterns of subordination and exclusion that are based on an individual's sex- and gender-related traits. The statutory language proscribing discrimination based on an individual's sex contains no restrictions, and thus, on its face, embraces any conduct that is based, to any degree, on any aspect of the plaintiff's sex. Moreover, established rules of statutory construction command that remedial statutes such as Title VII are to be construed broadly.436 These rules support the application, in the same-sex sexual harassment context, of the broad formulations of sex and sex-based causation that have developed in other contexts.

Although there is little legislative history to guide the courts in adjudicating issues of sex-based discrimination under Title VII,437 the sparse legislative history that does exist reveals an intent to redress patterns of sex segregation in the employment market.438 As discussed above, the forms of gender stereotyping and sexual subordination at issue in many male-on-male sexual harassment cases perpetuate workplace gender hierarchies and preserve the masculinization of certain sectors of employment.439 Thus, such conduct, which requires individuals to conform to certain gender-defined expectations in order to be accepted as an equal in certain jobs, implicates this central concern undergirding Title VII's prohibition against discrimination on the basis of sex.

Likewise, in a more general sense, the legislative history of Title VII reflects an intent to remove arbitrary barriers and ensure that all individuals are afforded an opportunity to compete in the employment market based on their


437. See supra note 23 and accompanying text.

438. See 110 CONG. REC. 2579-81 (1964) (statements of Reps. Griffith and St. George); see also Schultz, supra note 36, at 1758-59 & n.403 (discussing legislative history expressing an intent to remediate problem of sex segregation in labor market).

439. See supra Part II.B.
competence as workers rather than on their protected identity traits.\textsuperscript{440} The practice of same-sex sexual harassment consistently targets individuals for adverse treatment based on their protected gender-related traits rather than on their performance as employees, often driving the target out of the workplace because of the harassers’ conceptions of the appropriate gender identity of persons in that occupation.\textsuperscript{441} Same-sex sexual harassment, therefore, by reinforcing the gendered character of certain sectors of the employment market, undermines the merit-based equal employment opportunity objectives that Title VII seeks to advance.\textsuperscript{442} Accordingly, the statutory language and legislative history lend further support to a broad construction of Title VII’s sex-based causation requirement that encompasses all forms of adverse conduct directed at individuals because of the sex- and gender-related aspects of their individual identities.

Because \textit{Oncale}’s dicta reflect a rigid, biologically dualistic notion of sex that fails to countenance the powerful patterns of gender-based stereotyping and subordination that occur among members of the same biological sex, some observers have inferred from \textit{Oncale}’s conspicuous silence regarding such conduct an implicit rejection of broader theories of sex-based causation founded on gender-stereotyping and gender-subordinating conduct.\textsuperscript{443} However, nothing in \textit{Oncale}’s dicta purports to abrogate or supplant the significant body of jurisprudential and legislative authority for a broad, flexible definition of sex and sex-based causation that would encompass patterns of gender-based subordination among individuals of the same biological sex. Accordingly, courts addressing claims of same-sex sexual harassment must ensure that they do not uncritically revert to the unduly constrained conceptions of sex that have emerged in the prior same-sex sexual harassment jurisprudence and persisted in \textit{Oncale}. Instead, they must adjudicate questions of sex-based causation in accordance with established Title VII principles that recognize the sex-based nature of a range of conduct that is motivated in whole or in part by an individual’s sex- and gender-related attributes.

\textsuperscript{440} See Schultz, supra note 36, at 1796 ("From the beginning, the central purpose of [Title VII’s] prohibition on sex discrimination has been to enable everyone—regardless of their identities as men or women, or their personae as masculine or feminine—to pursue their chosen endeavors on equal . . . terms.").

\textsuperscript{441} As Justice O’Connor observed in \textit{Harris v. Forklift Systems, Inc.}, 510 U.S. 17, 22 (1993), a “discriminatorily abusive work environment . . . can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing their careers.” A striking number of same-sex sexual harassment cases bear out this observation. See, e.g., \textit{Oncale}, 118 S. Ct. at 1002 (plaintiff quit his job following constant threats of rape and incidents of sexual assault); Doe v. City of Belleville, 119 F.3d 563, 566 (7th Cir. 1997) (plaintiffs quit jobs at which they were subjected to campaign of gender-based epithets, threatened rape, and physical assault), vacated and remanded, 118 S. Ct. 1183 (1998); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1194 (4th Cir. 1996) (plaintiff developed “severe emotional problems” that required him to leave his job following campaign of sexual epithets, threats, and assaults); Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1048 (N.D. Ala. 1996) (plaintiff left job on medical leave and never returned following constant taunting and sexual threats and assaults including attempt to penetrate his anus with a broom handle).

\textsuperscript{442} See Johnson v. Transportation Agency, 480 U.S. 616, 628 (1987) (describing Title VII’s objective of “break[ing] down old patterns of [workplace] segregation and hierarchy”); see also supra Part ILB (discussing role of same-sex sexual harassment in perpetuating workplace gender segregation and hierarchies).

\textsuperscript{443} See supra notes 388, 401 and accompanying text.
B. Contemporary Understandings of “Sex:” Recognizing the Limits of Biological Determinism

As discussed above, Title VII is drafted broadly to proscribe all adverse employment actions that occur “because of” the plaintiff’s “sex.” As is appropriate in the context of a remedial statute, the courts have construed these terms expansively to encompass all forms of conduct that are based on any aspect of the plaintiff’s sex or gender identity. The following discussion turns from the judicial and legislative formulations of sex to the social and sociological significance of “sex,” and demonstrates that the term is widely understood to encompass numerous distinct but interrelated aspects of an individual’s identity. These aspects include chromosomal composition, genital configuration, secondary physical sex characteristics and projected and perceived gender traits derived from gendered standards of appearance, comportment and demeanor, as well as aspects of the individual’s projected sexuality and sexual expression. The multi-dimensional nature of the phenomenon of sex and the complex ways in which it affects an individual’s identity and interactions with others further underscore the inadequacy of the constrained, biologically-centered conception of sex implicit in many same-sex harassment cases and reflected uncritically in Oncale.

The concept of “sex” is complex, multi-faceted, and in many respects ambiguous, encompassing notions of an individual’s biological sex (male or female), core gender identity (woman or man), gender role identity (feminine or masculine), and sexual expression or behavior. As a biological classification, sex (male or female) generally denotes “the physical attributes of bodies, specifically the external genitalia.” Gender (masculinity and femininity), on the other hand, is culturally and socially constructed and consists primarily of the “expressions” of a person’s gender inherent in his or her adherence to behavioral norms such as standards of dress, demeanor, and conduct typically associated with masculinity or femininity. Thus, gender is used to “describe personality attributes and socio-sexual roles that society understands to be ‘masculine’ or ‘feminine’ and that society ascribes on the basis of sex.”

Because of the history of male domination in many sectors of the employment market, many attributes stereotypically associated with masculinity have come to be associated with valuable, capable workers, while the attributes stereotypically associated with femininity have come to be

444. See supra Part IV.A.1.
447. See JUDITH BUTLER, GENDER TROUBLE 25 (1990) (“There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very expressions that are said to be its results.”).
448. Id.
perceived as inconsistent with occupational proficiency. Thus, stereotypically masculine attributes such as physical strength, assertiveness, and sexual aggressiveness have come to be associated with power and dominance in the workplace, while stereotypically feminine qualities such as physical frailty, passivity, and sexual submissiveness have become signifiers of powerlessness and marginalization in the workplace.

The powerful associations that have historically existed between biological sex, gender attributes, and allocations of power and privilege have led to a conflation of these distinct phenomena of sex, gender, and power, and a tendency to polarize notions of gender and power into simplistic conceptions of masculine power and feminine powerlessness, which are presumed to exist in binary opposition to one another as corollaries of the male-female dichotomy of

---

449. See supra notes 235-236 and accompanying text. There is significant literature on the characteristics stereotypically associated with men and with women. See Case, supra note 6, at 12-13 ("Among the adjectives conventionally coded masculine are 'aggressive,' 'ambitious,' 'analytical,' 'assertive,' 'athletic,' 'competitive,' 'dominant,' 'forceful,' 'independent,' 'individualistic,' 'self-reliant,' 'self-sufficient,' and 'strong,' while characteristics conventionally gendered feminine include being 'understanding,' 'warm,' 'able to devote oneself completely to others,' 'gentle,' 'helpful to others,' 'kind,' and 'aware of others' feelings."); Craig, supra note 11, at 106, 112 (qualities such as passivity or sensitivity are generally considered feminine, while power and dominance are usually considered masculine traits); Law, supra note 254, at 208 ("Traditional concepts of gender cast man as strong, woman as subservient; man as not responsible for family care, woman as nurturant; man as sexually aggressive, and woman as passive victim, whether virginal or whore."); and Valdes, supra note 446, at 179 (discussing the Greek and Euro-American origins of the active/passive gender paradigm and explaining that "'male' was viewed as socially and sexually 'active'—the strong, public, self-willed master of the universe; in contrast, 'femal' was constructed as 'passive'—the male's weak, volatile companion, whom he managed and protected for the benefit of all").

The Oakland Men's Project, a non-profit organization devoted to community education about issues of male violence, sexism, racism, and homophobia, conducts workshops where they ask young people what it means to be a man or a woman. Robert Allen reports that the children consistently express the same set of expectations about how men and women should behave:

Men are expected to be in control, tough, aggressive, independent, competitive, and emotionally unexpressive (with the exception of anger and sexual desire, which are allowable emotions for men).

Women, on the other hand, are expected to be polite, dependent, emotional, and sexy, to take care of others, and not to be too smart or pushy.

Race, Gender, and Power in America, supra note 99, at 131. When asked about the messages they get about appropriate behavior from their role models, the boys said things like: "A man is tough. A man is in control. A man doesn't cry. It's okay for a man to yell at someone. A man can take it. A man is responsible. A man is competent. A man doesn't take crap from anyone else." Id. at 132. Regarding expectations of female behavior the young people say things like: "A girl should be polite and clean, she shouldn't argue, she's pretty, she doesn't fight or act too smart, she helps others, she's emotional." Id. at 133.

450. See supra notes 235-236 and accompanying text; see also Case, supra note 6, at 12; Craig, supra note 11, at 106, 112; Christine A. Littleton, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279, 1280 (1987) (noting that "those things culturally identified as 'male' are more highly valued than those identified as 'female,' even when they appear to have little or nothing to do with either biological sex"); Deborah L. Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1178 (1988) (noting that perceptions of successful professionals diverge significantly from perceptions of women). A study of American women working in professional fields such as medicine, college teaching, scientific research and psychiatric social work at the turn of the century, for example, describes successful professionals of the time "not only as being 'objective, competitive, individualistic and predictable' but also as being 'scornful of nurturant, expressive and familial styles of personal interaction.' Celia Davies, The Sociology of Professions and the Profession of Gender, 30 Brit. Soc. Ass'n PUBLICATION LTD. 661 (Nov. 1, 1996); see also Law, supra note 254, at 209 ("The prevailing social meaning attached to gender systematically denies the value of traditional women's work.").
biological sex. Because of the traditionally close correlations between sex, gender, and power, biological sex has been used as a proxy for an individual’s workplace gender identity and resulting status in terms of workplace gender hierarchies. Thus, in many circumstances, issues of gender and power have been conceptualized in accordance with the male-female biological dichotomy.

However, this polarized, binary conception of gender-based attributes and power dynamics obscures the reality that individual men are distributed across a broad spectrum in terms of the degree to which they exhibit traditional signifiers of masculinity such as aggressiveness, physical strength, and sexual dominance. Individual men are thus also distributed across a broad spectrum in terms of their status on the workplace gender hierarchies that allocate power according to images of masculinity. Accordingly, although two males may share the same biological sex identity in terms of chromosomal composition and genital configuration, they may be situated quite differently from one another in terms of their gender-derived projected and perceived sex identities and the power relations that result therefrom. In these circumstances, a gender-centered analysis of their sex identities will expose numerous gender-based distinctions and resulting power differentials between these two males, while a biologically-centered analysis will obscure these potent gender-based power dynamics.

See generally Koppelman, supra note 8, at 234-35 (discussing distinctions between males that underlie “rankings of masculinity,” and that are used to distinguish “between males who are ‘real men’ and have power and males who are not” (quoting Joseph Pleck, Men’s Power with Women, Other Men, and Society: A Men’s Movement Analysis, in The American Man 417,424 (Elizabeth L. Pleck & Joseph Pleck eds., 1980))); Valdes, supra note 446, at 169-70 (discussing “hetero-patriarchal categories and hierarchies that privilege masculine, heterosexual men and subordinate all other sex/gender types”). See also supra Part II.B.2 (discussing masculinity-driven power hierarchies in the workplace).

In assuming that all members of the male biological sex and all members of the female biological sex are similarly situated, the courts also implicitly assume that there is a clearly discernible line between biological males and biological females. This assumption is called into question by the increasing presence of transgendered people for whom:

one’s sense of being a man or woman has no relation to the anatomical characteristics that label her as male or female. . . . The sex of a transgendered person is only partially based upon [the] genitals; the rest is a sometimes strange admixture of complementary and competing
Same-sex sexual harassment often occurs in instances where an individual’s gendered attributes diverge from the qualities typically expected from members of the plaintiff’s biological sex, giving rise to a gender-based power differential between two members of the same biological sex. 455 In these circumstances, the individual’s outwardly projected and perceived characteristics converge to produce the gender identity that, in turn, determines the treatment he receives in the workplace. It is the individual’s gender-related attributes that relegate him to a position of lesser masculinity, and therefore lesser power, despite his biologically male chromosomal composition and genital configuration. In terms of workplace power dynamics, the gender-based aspects of his sex identity assume a significance that far surpasses that of his biological sex identity, as demonstrated by the fact that his male chromosomal and genital attributes are powerless to elevate him to a status equal to that of his harassers who marginalize and demean him on the basis of deficiencies in his projected and perceived masculinity. 456

Accordingly, a focus on biological sex ignores the aspects of “sex” that, in many instances, most powerfully and directly determine a person’s identity, status, and treatment in the workplace. By emphasizing the fact that both the harasser and the target share male biological traits, courts erroneously equate biological maleness with privileged workplace gender status. In doing so, they effectively presume gender to be a monolithic notion coterminous with biological sex, thus obscuring the reality that the harasser and the target occupy markedly divergent positions on the workplace gender hierarchies by virtue of their differing projections of the stereotypically masculine traits that, often more directly than simple biology, signify power and privilege in the workplace. 457

When harassers subordinate targets based on their projection of stereotypically feminine traits or their failed projection of stereotypically masculine traits, they perpetuate and reinforce the gender-suffused power dynamics underlying patterns of sex-based exclusion in employment, and they subject specific individuals to unfavorable conditions of employment based on aspects of their sex identities. By formulating notions of “sex” in a manner that focuses myopically on biological status, courts arbitrarily exclude the aspects of

anatomical secondary physical characteristics, behaviors, life histories, psychological presumptions, and stereotypes.

Kristine W. Holt, Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence, 70 Temp. L. Rev. 283, 296, 301 (1997). While an exploration of the implications of transgendered identity in the context of sex discrimination doctrines is beyond the scope of this Article, it is important to note that the courts’ uncritical reliance on simplistic notions of “sex” will become increasingly problematic as courts attempt to apply their conceptions of “sex” to persons who do not fit into the courts’ restrictive dichotomies and whose legal ‘sex’ may be the subject of some controversy. Compare, e.g., In re Ladrach, 513 N.E.2d 828, 832 (Ohio Probate Ct. 1987) (holding that male-to-female transsexual was still considered male under Ohio law) with M.T. v. J.T., 355 A.2d 204, 208-09 (N.J. Super. Ct. App. Div. 1976) (holding that male-to-female transsexual was considered female under New Jersey law).

455. See supra Part II.B (discussing forms of harassment and subordination directed at men who exhibit stereotypically feminine traits or who fail to exhibit appropriately masculine demeanor and sexual expression).

456. See supra Part II.B (analyzing instances of harassment based on differences in projected and perceived masculinity).

457. See supra note 453 and accompanying text (discussing masculinity-based hierarchies among males).
sex identity that are most relevant to Title VII. Thus, when courts predicate their sex-based causation analysis on biologically centered notions of sex, they arbitrarily exclude from the definition of sex-based conduct acts that are not based solely and directly on biological sex, but that nonetheless are inextricably intertwined with biological sex because they penalize the male target for failing to satisfy gender-based expectations that are imposed upon him only because of his male biological sex.458

Only by viewing all males monolithically, as presumed equals in the workplace based on their shared biological traits, and thereby obscuring the otherwise apparent gender-based distinctions among them, can the courts hold that conduct that exploits gender-based distinctions and vulnerabilities is not based on essential aspects of the target’s “sex” as that term is commonly understood. Courts that have so held have relied on a rigid, constrained notion of sex that recognizes only a simplistic dichotomy between biological males and biological females, with no analysis of the complex facets of an individual’s sex as it is projected to and perceived by others in the workplace. This restrictive formulation of the concept of “sex,” which focuses narrowly on biological attributes, while disregarding gender traits and sexual expression, lacks critical insight into the complexity of each individual’s projected and perceived sex and the complex interrelationships between sex, sexuality, and power in the workplace.

As one scholar has explained, “[I]n every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles.”459 Thus, the distinctions upon which individuals are singled out for differential treatment in the workplace are not directly a function of the individual’s anatomical configuration or chromosomal composition, but rather arise more immediately from the individual’s projected sexual identity and gender-based characteristics that reflect a “degree of sexual agency beyond the rigid determinism of biology.”460 Accordingly, because it is the hierarchy of gender differences that transforms an anatomical difference into a socially relevant distinction, the courts’ insistence on ascribing to an individual male plaintiff a privileged status among the dominant males in the workplace, merely because he shares their biological traits, reveals a conceptually flawed focus on what is arguably the least relevant aspect of an individual’s sex in the context of employment discrimination.

Numerous developments have converged in recent years to complicate the traditional associations between biological sex, gender identity, gender roles, and power in the workplace and in the broader society. The entry of women into traditionally male-dominated workplaces,461 the increasingly shared

458. Cf. supra Part IV.A.1 (examining broader Title VII jurisprudence recognizing sex-based nature of such conduct that arises from gender-based perceptions and expectations).
460. Id. at 8.
461. See Nancy Barrett, Women and the Economy, in THE AMERICAN WOMAN 1987-88: A REPORT IN DEPTH 100 (Sara E. Rix ed. 1987) (describing how the number of married women with pre-school age children
responsibility for parenting, and the growing visibility of sexual minorities and transgendered persons have all played a role in destabilizing the alignment of sex, gender, status, and power which has historically perpetuated the biologically dichotomous view of gender and gender-based power relations. As the associations between a person’s biological attributes, gender, and projected sexual persona further destabilize, a more precise, sophisticated analysis of sex and sex-based interactions will become increasingly necessary in order to assess more accurately an individual’s sex identity as it is relevant to workplace interactions and power dynamics. The biologically dichotomous, gender-monolithic conception of sex that has already produced so many anomalous results in the same-sex sexual harassment jurisprudence is particularly ill-suited to this analysis. Thus, in the context of increasingly complex alignments of sex and gender traits, this constrained conception of sex will continue to obscure more than it illuminates about the sex-based dynamics that affect workplace interactions, and will further perpetuate unrealistic, gender-stereotyped perceptions that identity, power, and status in the workplace can be understood primarily as a function of biological sex.

Contemporary understandings of the nuances of an individual’s “sex” thus reveal that numerous aspects of the term—including those that are most relevant to assessing claims of sex-based employment discrimination—are not adequately captured by a biologically centered definition. Accordingly, these insights into the multi-faceted nature of the phenomenon of sex, as an aspect of an individual’s identity that is projected to and perceived by others, highlight the profound deficiencies of the biologically focused, gender-monolithic conceptions of “sex” underlying much of the same-sex sexual harassment jurisprudence, further underscoring the urgent need for courts addressing same-sex sexual harassment claims in the future to look beyond the confines of this

who were working outside the home and the percentage of women pursuing advanced professional degrees has increased substantially since 1960; Jennifer Merritt, Jump Seen in Number of Top-Paid Women Execs, BOSTON BUS. J., July 1, 1998, at S8 (“Times have changed for women in the business world, with women on this year’s Top 40 list experiencing a 16.2 percent increase from last year.”); Susan Page, Study: Women Make 75 Cents for Every $1 a Man Earns, USA TODAY, June 11, 1998, at 9A (showing that an increasing proportion of women are entering professional and other higher-paying fields).


464. See Case, supra note 6, at 16 n.36 (noting increasing complexities in sex, gender, and sexual identity that have “broken down the binaries of masculine/feminine, male/female, and gay/straight”).

465. See supra notes 388-391 and accompanying text (discussing self-perpetuating ramifications of judicial failures to acknowledge gender-based dynamics within a biological sex).

466. See generally Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1210 (1989) (discussing associations between gender, identity, status, and power in the workplace); Allan C. Hutchinson, Part of an Essay on Power and Interpretation with Suggestions on How to Make Bouillabaisse, 60 N.Y.U. L. REV. 850, 875-76 (1985); Valdes, supra note 446, at 170. The biologically centered notion of sex and gender identity adopts an essentialist approach that attributes gender-based differences to essential, biologically defined attributes of sex rather than to culturally and socially constructed gender paradigms that recognize differences between members of a biological sex. See ELIZABETH B. SPELMAN, INESSENTIAL WOMEN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 4 (1989); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 582, 584 (1990).
flawed jurisprudence and to analyze notions of “sex” and sex-based interactions in a manner that better comports with contemporary legal and social understandings of these phenomena.

V. CONCLUSION

Just as courts once failed to discern the sex-discriminatory nature of sexual harassment directed at women and accordingly characterized such conduct as a legally inconsequential expression of natural sexual desire, so the courts have been reluctant to recognize the sex-discriminatory nature of sexual harassment directed at men, and have trivialized such conduct as mere “locker room antics” or “horseplay.” In recent years, however, an increasing number of courts have begun acknowledging that sexually degrading and abusive conduct perpetrated by males against other males, particularly when combined with a pattern of gender-based derision, can constitute a powerful form of sex-based and sex-discriminatory harassment that targets individuals based on their projected and perceived gender attributes and perpetuates gender-based patterns of segregation and exclusion in the workplace.

When it handed down its decision in Oncale affording all plaintiffs an opportunity to challenge severe, pervasive sex-based harassment as a form of employment discrimination under Title VII, regardless of the sex or sexual orientation of the harasser and target, the Supreme Court made important strides toward extending Title VII’s coverage to many individuals who were denied recourse under the prior jurisprudence. Yet, while Oncale’s holding recognizes such claims as a matter of law, its dicta reflect constrained notions of sex and sex-based causation that view members of each biological sex monolithically, obscuring potent gender-based power dynamics among members of the same biological sex and making the sex-based nature of many forms of same-sex harassment difficult to prove as a matter of fact.

Although some courts have adopted the restrictive formulations of sex and sex-based causation implicit in Oncale’s dicta, nothing in Oncale compels them to do so. Thus, in adjudicating questions of sex-based causation, the courts should resist the impulse to revert to the constrained conceptions of sex introduced in the earlier same-sex sexual harassment jurisprudence and perpetuated sub silentio in Oncale, and should instead undertake a rigorous, principled analysis of the conduct before them in light of the extensive

467. See Franke, supra note 11, at 698-701 nn. 19-30 (discussing early cases rejecting sexual harassment claims).


469. See supra Part II.A.4 (discussing cases acknowledging sex-based nature of same-sex sexual harassment); supra Part II.B (discussing sex-based nature and sex-discriminatory consequences of such conduct).
By incorporating the broader, more flexible notions of sex that have evolved outside the same-sex sexual harassment context, courts can begin to delve beneath biological dichotomies and dispel the myth of the gender monolith that has pervaded same-sex sexual harassment cases and precluded recognition of deeply-rooted patterns of gender-based subordination among members of the same biological sex. In this manner, the courts can begin adjudicating same-sex sexual harassment claims in a manner that better comports with the broader Title VII jurisprudence and better serves Title VII's purpose of allowing each individual to pursue employment opportunities unimpeded by discrimination based on his or her sex.